

No. 96-643-CFX
Status: GRANTED

Title: Steel Company, aka Chicago Steel and Pickling
Company, Petitioner
v.
Citizens For A Better Environment

Docketed:

October 23, 1996

Court: United States Court of Appeals for
the Seventh Circuit

Counsel for petitioner: Stein, Sanford M.

Counsel for respondent: Brusslan, James D.

Entry	Date	Note	Proceedings and Orders
1	Oct 21 1996	G	Petition for writ of certiorari filed. (Response due January 22, 1997)
3	Nov 18 1996		Brief amicus curiae of Pacific Legal Foundation filed.
2	Nov 21 1996		Waiver of right of respondent Citizens for a Better Environment to respond filed.
5	Nov 22 1996	X	Brief amici curiae of Mid-America Legal Foundation, et al. filed.
4	Nov 26 1996		DISTRIBUTED. December 13, 1996 (Page 3)
6	Dec 9 1996	F	Response requested -- CJ.
7	Dec 13 1996		Order extending time to file response to petition until January 22, 1997.
8	Jan 21 1997		Brief of respondent Citizens for a Better Environment in opposition filed.
9	Feb 3 1997		Reply brief of petitioner Steel Company filed.
10	Feb 5 1997		REDISTRIBUTED. February 21, 1997 (Page 1)
11	Feb 24 1997		Petition GRANTED. SET FOR ARGUMENT October 6, 1997. *****
13	Mar 12 1997		Order extending time to file brief of petitioner on the merits until May 2, 1997.
14	Apr 29 1997		Brief amicus curiae of Pacific Legal Foundation filed.
15	May 2 1997		Brief amicus curiae of Clean Air Implementation Project filed.
16	May 2 1997		Brief amicus curiae of Chemical Manufacturers Association filed.
17	May 2 1997		LODGING consisting of eleven copies of EPA Toxic Chemical Release Inventory Reporting Form R and Instructions, Section 313, 1995 Version, submitted by counsel for amicus Chemical Mfgs. Assn.
18	May 2 1997		Brief amicus curiae of Washington Legal Foundation filed.
19	May 2 1997		Brief amici curiae of American Forest & Paper Association, Inc., et al. filed.
20	May 2 1997		Brief amici curiae of American Iron & Steel Institute, et al. filed.
21	May 2 1997		Joint appendix filed.
22	May 2 1997		Brief of petitioner The Steel Company filed.
23	May 2 1997		Brief amici curiae of Mid-America Legal Foundation, et al. filed.
24	May 8 1997		LODGING consisting of one copy of "Safety Contingency Plan submitted by counsel for the petitioner
26	May 20 1997		Order extending time to file brief of respondent on the

Entry	Date	Note	Proceedings and Orders
			merits until June 23, 1997.
27	Jun 23 1997		Brief of respondent Citizens for a Better Environment filed.
28	Jun 23 1997		LODGING consisting of one copy of spiral bound Guide to SE Chicago's Major Polluting Industries and one copy of petitioner's 1995 Form R. submitted by counsel for the respondent
29	Jun 23 1997		Brief amicus curiae of United States filed.
30	Jun 23 1997		LODGING consisting of one copy of Final Penalty Policy of EPA's Office of Enforcement, June 13, 1990, and one copy of EPA's Enforcement Response Policy, August 10, 1992 submitted by the Solicitor General
31	Jun 23 1997		Brief amici curiae of New York, et al. filed.
32	Jun 23 1997		Brief amici curiae of Natural Resources Defense Council, Inc., et al. filed.
33	Jul 2 1997	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
35	Jul 25 1997	X	Reply brief of petitioner The Steel Company filed.
34	Jul 28 1997		CIRCULATED.
36	Aug 15 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Seventh Circuit.
37	Sep 12 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
38	Oct 3 1997		Record filed.
		*	Original record proceedings United States District Court for the Northern District of Illinois.
39	Oct 6 1997		ARGUED.

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No.

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

**THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,**
Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Emergency Planning and Community Right-to-Know Act ("EPCRA") allows citizen suits against parties "for failure to . . . complete and submit" certain forms. The district court, agreeing with the Sixth Circuit Court of Appeals, found that once the forms were completed and submitted, citizen enforcement options ended. The Seventh Circuit Court of Appeals reversed, holding that citizen suits are also authorized for historical violations. The Seventh Circuit did not follow the reasoning of the Supreme Court of the United States, which has held that the similar citizen suit provision of the Clean Water Act does not authorize citizens to sue for historical violations.

The question presented for review is:

Whether, in enacting the citizen suit provision of EPCRA, 42 U.S.C. § 11046, Congress intended to authorize citizens to seek penalties for violations that were cured before the citizen suit was filed, thereby granting EPCRA citizen suit plaintiffs greater enforcement authority than that granted to other citizen suit plaintiffs under other federal environmental statutes.

STATEMENT PURSUANT TO RULE 29.6

The Steel Company, a corporation, has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner The Steel Company respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 90 F.3d 1237, and is reprinted with the court's order in the Appendix hereto at pages A1 to A16. The order and opinion of the United States District Court for the Eastern District of Illinois is reported at 42 Env't Rep. Cas. (BNA) 1186, and is reprinted in the Appendix at pages A17 to A27.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on July 23, 1996. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 326 of EPCRA, 42 U.S.C. § 11046, provides in pertinent part:

(a)(1) Except as provided in subsection (e) of this section, any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

(i) Submit a followup emergency notice under section 11004(c) of this title.

(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.

(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.

(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

(b)(1) Any action under subsection (a) of this section against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

(c) The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement.

(d)(1) No action may be commenced under subsection (a)(1)(A) of this section prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator.

(e) No action may be commenced under subsection (a) of this section against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this chapter with respect to the violation of the requirement.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Section 326(a) of EPCRA, 42 U.S.C. § 11046(a), and 28 U.S.C. § 1331 (general federal question jurisdiction).

A. The Structure of EPCRA

In 1986, Congress enacted EPCRA, which included certain reporting requirements for industrial facilities. The main purposes of EPCRA are twofold: 1) to compile information on the presence and release of chemical substances and make that information available to the public; and 2) to use the reported information to help formulate emergency response plans to react to accidental releases of chemicals. App. at A2-A4.

Of the six EPCRA reporting requirements applicable to industry, two are at issue here. Section 312 of EPCRA requires certain facilities to submit inventory forms, which provide information regarding the amount and location of "hazardous chemicals" at a facility, to state and local agencies. 42 U.S.C. §§ 11022(a), 11022(d). The inventory forms for a given calendar year are due the first of March in the following year. 42 U.S.C. § 11022(a).

Section 313 of EPCRA requires certain facilities using any of 651 specified "toxic chemicals" to submit forms which provide information about the amount of those chemicals present at a facility and their release, if any, into the environment. Section 313 forms are submitted to the United States Environmental Protection Agency ("EPA") and a designated state official. 42 U.S.C. §§ 11023(a), 11023(g); 40 C.F.R. § 372.65. EPA has created the "Form R" as its uniform chemical release form. 40 C.F.R. § 372.85. Form Rs for a given calendar year are due on July 1 of the following year. 42 U.S.C. § 11023(a).

Violators of Sections 312 and 313 may be liable to the United States for civil penalties up to \$25,000 for each day of violation. 42 U.S.C. § 11045(c)(1 & 3). EPA may seek civil penalties either in an administrative action or in federal court. 42 U.S.C. § 11045(c)(4).

EPCRA authorizes private citizens to bring enforcement actions regarding four of the six reporting requirements. In pertinent part, EPCRA provides that "any person may commence a civil action on his own behalf against . . . an owner or operator of a facility for failure to . . . [c]omplete and submit an inventory form under section [312] [or] a toxic chemical release form under section [313]. . . ." 42 U.S.C. § 11046(a)(1)(A)(iii & iv). A citizen plaintiff may not bring a lawsuit without waiting at least sixty days after providing notice of the alleged violation to EPA, the state, and the alleged violator. 42 U.S.C. § 11046(d)(1). A citizen suit is barred if EPA is pursuing the violator administratively or in court. 42 U.S.C. § 11046(e). In presiding over a citizen suit, a district court has jurisdiction "to enforce the requirement concerned and to impose any civil penalty provided for a violation of that requirement." 42 U.S.C. § 11046(c). A court may award costs of litigation, including attorney's and expert witness fees, "to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate." 42 U.S.C. § 11046(f).

B. Proceedings Below

On March 16, 1995, Citizens for a Better Environment ("CBE") sent to the EPA, the Illinois Environmental Protection Agency ("IEPA"), and The Steel Company an EPCRA 60-day notice of intent to sue alleging that The Steel Company had not submitted certain forms as required by Sections 312 and 313 of EPCRA. On May 1, 1995, before the 60-day notice period had expired, The Steel Company sub-

mitted Section 312 and 313 forms to the following statutorily-designated authorities: EPA, IEPA, the Illinois Emergency Management Agency, and the Chicago Fire Academy. App. at A19, A25.

Notwithstanding The Steel Company's compliance within the 60-day period, on August 7, 1995, CBE filed suit against The Steel Company alleging reporting violations of EPCRA. CBE alleged only past EPCRA violations, and, significantly, CBE did not seek injunctive relief ordering The Steel Company to comply with EPCRA. App. at A19, A25. The Steel Company filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguing that Congress did not authorize citizen suits for past EPCRA violations. Relying on the Sixth Circuit's opinion in *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473 (6th Cir. 1995), the district court granted The Steel Company's motion:

This Court concludes that § 326(a) of EPCRA does not provide the right for a citizen to sue for historical violations of the Act. The "complete and submit" language of that section, along with the purpose of the notice provision and Congress' intended role for the citizen-plaintiff, leads the Court to that decision. . . . In addition, it is uncontested that before the Complaint was filed, Steel Company filed the proper forms with the required agencies for the relevant periods in response [to] CBE's notice of intent to sue. If it were not the case it seems likely that CBE would have included such an allegation in their complaint; no such allegation is present. Because the Complaint alleges only a failure to timely file the required reports, a violation of the Act for which there is no jurisdiction for a citizen suit, the Court dismisses the Complaint.

App. at A24-A26 (footnotes omitted).

CBE appealed the judgment of the district court to the Seventh Circuit Court of Appeals. On July 23, 1996, the Seventh Circuit reversed the judgment of the district court. The Seventh Circuit's decision creates a clear conflict on this question with the Sixth Circuit and also conflicts with relevant decisions of this Court, including several regarding congressional authority to grant standing to a citizen plaintiff.

The Seventh Circuit noted that the district court's reliance on the Sixth Circuit's decision "was not misplaced—*United Musical Instruments* is factually indistinguishable from this case." App. at A8. The court also noted that the Sixth Circuit in turn had relied upon *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), in which this Court held that citizens could not sue for past violations of the Clean Water Act. App. at A9.

Nevertheless, the Seventh Circuit chose not to follow the Sixth Circuit's reasoning in *United Musical* or this Court's decision in *Gwaltney*. With respect to *United Musical*, the Seventh Circuit squarely disagreed. With respect to *Gwaltney*, the Seventh Circuit chose to focus on a difference in statutory wording to conclude that Congress must have intended EPCRA citizen plaintiffs to sue for historical violations: the Clean Water Act authorizes a citizen to sue a facility "alleged to be in violation" of its permit, while EPCRA authorizes a citizen to sue "for failure to" comply with certain reporting requirements. App. at A11. The court also failed to follow this Court's reasoning that one purpose of the 60-day citizen notice period is to allow an alleged violator an opportunity to come into compliance, thereby rendering a citizen suit unnecessary. App. at A13. The court of appeals chose not to examine Congress's reasons for establishing the notice period, and apparently dismissed this Court's reasoning in *Gwaltney* on the sole ground that

because Congress amended the Clean Air Act in 1990 to permit citizen suits for some past violations, yet left the notice provision intact, Congress must have intended to delete the opportunity to come into compliance within 60 days from all environmental citizen suits. *Id.*

The court also failed to recognize that Congress modelled EPCRA's citizen suit provision after long-standing principles found in all environmental citizen suit provisions, and thus did not intend to have EPCRA's provision operate differently from those of other statutes. The Seventh Circuit's decision granting citizens the right to sue for past EPCRA violations also conflicts with decisions of this Court regarding standing of citizens to bring suit for environmental violations. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

REASONS FOR GRANTING THE PETITION

Although Congress did not expressly authorize citizens to sue for past violations of EPCRA, the Seventh Circuit granted citizens that right. In so doing, the court of appeals decided an important federal question in an extremely active area of environmental law. Since EPCRA's enactment, citizen groups have sent hundreds of letters to industry announcing their notice of intent to sue. Such letters are sent and received nationwide, affecting industry throughout the country. This case provides an opportunity to decide whether Congress intended to authorize citizens to sue for past EPCRA violations.

I.

THE COURT OF APPEALS' INTERPRETATION OF 42 U.S.C. § 11048 CONFLICTS WITH THE SIXTH CIRCUIT'S INTERPRETATION AND ALSO FAILS TO FOLLOW APPLICABLE DECISIONS OF THE SUPREME COURT

A. This Court Has Held That Congress Provided a Notice Period in Environmental Citizen Suits to Allow the Alleged Violator an Opportunity to Come into Compliance

In *United Musical*, the Sixth Circuit faced the same issue as did the Seventh Circuit in this case. The Sixth Circuit held that:

We discern nothing in the legislative history that indicates that Congress intended to allow citizens to sue [for past violations]. Although civil penalties for purely historical violations may be appropriate in some cases, the congressional scheme leaves to the EPA, with its broad perspective on the entire spectrum of enforcement and compliance, discretion to determine those violators whose conduct warrants such penalties.

United Musical, 61 F.3d at 477. The Seventh Circuit expressly rejected the Sixth Circuit's holding. App. at A10.

The Sixth Circuit based much of its conclusion on the Supreme Court's interpretations of environmental citizen suit provisions as set forth in *Gwaltney* and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). *United Musical*, 61 F.3d at 475-77. In *Gwaltney*, this Court was faced with deciding whether Congress intended to authorize citizen suits for past violations of the Clean Water Act. The Court's examination of the mandated 60-day waiting period led it to conclude that Congress could not have intended such suits. Justice Marshall, writing for a unanimous Court, explained the purpose of the notice provision:

If [EPA] or the State commences enforcement action within that 60-day period, the citizen suit is barred,

presumably because governmental action has rendered it unnecessary. It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes wholly gratuitous.

484 U.S. at 59-60.

The Court also found that the legislative history of the Clean Air Act, which created the first citizen right to sue, and that of the Clean Water Act, supported its interpretation that citizen suits may not target past violations because Congress clearly intended citizen suits to be injunctive in nature. "These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws." *Id.* at 61 (statement of Sen. Bayh). Other members of Congress supported this limitation on citizen enforcement authority. *Id.* at 61-62. This Court also acknowledged Congress's fear that the federal courts not be burdened with unnecessary citizen suits where, as here, the violation had already been corrected, *id.* at 59-61, yet the Seventh Circuit chose to ignore this concern.

The court of appeals dismissed this Court's *Gwaltney* reasoning regarding the notice period solely on the basis that three years after *Gwaltney*, Congress amended the Clean Air Act "to permit citizen enforcement actions for past violations, yet left the notice provision intact." App. at A13. But the Seventh Circuit failed to recognize that Congress addressed its *Gwaltney* concerns carefully and with limitation. Under the amended Clean Air Act, a citizen may sue for past violations only "if there is evidence that the alleged violation has been repeated." 42 U.S.C. § 7604(a)(1). Some-

how the Seventh Circuit discerned in this amendment a wholesale repudiation of *Gwaltney* finding that the notice period no longer functions as an opportunity to cure, and applied that flawed reasoning to EPCRA, a statute Congress did not amend. App. at A13.

In reiterating its *Gwaltney* reasoning two years later in a citizen suit filed under the Resource Conservation and Recovery Act ("RCRA"), this Court again sought guidance from congressional intent behind the first environmental citizen suit provision and found that "the legislative history [of the Clean Air Act] indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29. As it had in *Gwaltney*, this Court acknowledged that Congress intended the notice period to stimulate action either by the government or the alleged violator. First, the notice period allows the government to bring an enforcement action "thus obviating the need for citizen suits." *Id.* Second, the notice period gives the alleged violator an opportunity to bring itself into compliance and likewise "render a citizen suit unnecessary." *Id.*, citing *Gwaltney*, 484 U.S. at 60.

As further evidence that Congress knew what it was doing when it established the various citizen suit provisions, this Court noted that "Congress has addressed the dangers of delay in certain circumstances and made exceptions to the required notice periods accordingly." *Id.* at 30 (noting that citizens may sue immediately for certain, more serious, violations of the Clean Air and Clean Water Acts). This Court acknowledged that although "potential damage to the environment . . . could ensue during the 60-day waiting period, this problem arises as a result of the balance struck by Congress in developing the citizen suit provisions." *Hallstrom*, 493 U.S. at 30; see also *Dague v.*

City of Burlington, 935 F.2d 1343, 1351 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (Congress carved out an exception to RCRA's notice period allowing citizens to sue immediately for hazardous waste violations because it "determined that with hazardous wastes the dangers of delay and the potential for greater damage to public health or the environment outweigh the justifications of the pre-suit delay periods.")

The court of appeals also failed to acknowledge that, if Congress had intended to authorize citizen suits for past EPCRA reporting violations, "it could easily have done so." See *United Musical*, 61 F.3d at 475. In *Gwaltney*, this Court was persuaded by the same argument:

Congress could have phrased its requirements in language that looked to the past . . . but it did not choose this readily available option. . . . Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations.

Gwaltney at 57 & n.2 (referring to Congress's 1984 RCRA amendment authorizing citizen suits against any "past or present" generator, transporter, owner or operator "who has contributed or who is contributing" to the "past or present" handling, storage, treatment, transportation or disposal of certain wastes.) Another example of Congress's specifically targeting past violations is its 1990 amendment which first authorized citizens to sue for past Clean Air Act violations. As Congress refrained from adding this language to other citizen suit provisions, the Seventh Circuit was wrong to use the Clean Air Act amendment to distinguish this Court's decision in *Gwaltney*.¹

¹ Originally, the Clean Air Act provided solely injunctive relief to a citizen plaintiff. In 1990, Congress also amended the Clean Air

Prior to *Gwaltney*, several lower courts had examined the legislative history of citizen suits and reached the same conclusion. *Proffitt v. Commissioners, Township of Bristol*, 754 F.2d 504, 506 (3d Cir. 1985) (the purpose of the Clean Water Act's and RCRA's notice provisions "is to obviate the need for resort to the courts by prompting either" government enforcement or voluntary compliance); *City of Highland Park v. Train*, 519 F.2d 681, 690-91 (7th Cir. 1975) (in establishing the Clean Air Act's notice provision, "Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts."); *California v. Department of Navy*, 431 F. Supp. 1271, 1278 (N.D. Cal. 1977) (the purpose of the Clean Air Act's notice is to encourage voluntary compliance "with a view toward relieving already overburdened federal courts of precipitate litigation"), *aff'd*, 624 F.2d 885 (9th Cir. 1980). "Litigation should be a last resort only after other efforts have failed." *Hallstrom v. Tillamook County*, 844 F.2d 598, 600-01 (9th Cir. 1987), *aff'd*, 493 U.S. 20 (1989).

In its most recent ruling interpreting environmental citizen suits, this Court reinforced its line of reasoning first announced in *Gwaltney* and *Hallstrom* and held that the "imminent and substantial endangerment" section of RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), "was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms. . . ." *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1255 (1996). The citizen suit provision at issue here should not be accorded any greater meaning. EPCRA's effect on the en-

¹ (...continued)

Act to authorize courts to assess penalties, yet another indication that Congress knows how to provide citizens with the options it deems warranted. Pub. L. No. 101-549, 104 Stat. 2399, 2682 (codified at 42 U.S.C. § 7604(a)).

vironment is far less direct than that of RCRA and other environmental statutes, which regulate actual harm to our nation's air, water and land. In contrast, EPCRA requires the filing of information. The Seventh Circuit's strained reading of EPCRA's citizen suit provision erroneously led it to conclude that Congress must have intended citizens to pursue actions for past information reporting violations, while this Court found no such intent for violations that involve actual harm to the environment. This Court's review is required to clarify its reasoning in *Gwaltney*.

B. The Seventh Circuit Elevated Citizen Plaintiffs to an Enforcement Level Equal to That of EPA, a Result Congress Clearly Did Not Intend

The Seventh Circuit also failed to appreciate the crucial distinction between government and citizen enforcement of EPCRA: Congress simply did not intend to provide citizens with the same enforcement authority it gave to the government. This Court has recognized this significant difference and found that the citizen's role in environmental enforcement "is meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 60. This Court expressed understandable concern regarding the possibility that citizen suits could hamper the government's enforcement discretion:

If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

Id. at 61. The Sixth Circuit was also rightly concerned that allowing EPCRA citizen suits for past violations could inhibit EPA's enforcement discretion. *United Musical*, 61 F.3d at 476.

If the Seventh Circuit's decision is allowed to stand, a citizens group, at least in the Seventh Circuit, can challenge any EPA settlement under EPCRA as not having been "diligently pursued." See 42 U.S.C. 11046(e). For example, if EPA agrees to forgo assessing penalties against an EPCRA violator and instead requires an environmentally beneficial project, a citizens group, under the decision below, can file suit seeking to overturn that settlement.² The court's decision also impairs EPA's ability to develop long-standing, cooperative relationships with the regulated community because citizen groups, which are not subject to EPA enforcement policies, can now second-guess every EPA enforcement action under EPCRA. As noted below, citizen groups have an enormous financial incentive to pursue every EPCRA violation, no matter how trivial or remote, an incentive not shared by EPA.

Moreover, in finding that Congress did not intend to authorize citizen suits for past Clean Water Act violations, this Court in *Gwaltney* heavily relied on the language of the Clean Water Act's citizen suit provision which grants dis-

² The United States filed an *amicus* brief and also was allotted time to argue in support of CBE's appeal to the Seventh Circuit. The government erroneously concluded that "the hypothetical articulated in *Gwaltney* could not occur under EPCRA." Nothing in EPCRA, however, prohibits a citizen group from now paging through thousands of settlements, however old, and challenging those the group feels are too lenient. The government failed to appreciate the ramifications of its position that now certainly will lead to litigation over past EPCRA violations that settling parties (and EPA) never could have imagined would later be subject to challenge.

trict courts jurisdiction "to enforce such an effluent standard . . . and to apply any appropriate civil penalties. . . ." (citing 33 U.S.C. § 1365(a)(emphasis added)). The Court reasoned:

[The Clean Water Act's citizen suit provision] does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referenced to in the same subsection, even in the same sentence. The citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement. A comparison of [the relevant Clean Water Act sections] thus supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit to enjoin or otherwise abate an ongoing violation.

Gwaltney, 484 U.S. at 58-59 (emphasis added).

EPCRA's citizen suit provision is identical; it does not authorize civil penalties separately from injunctive relief. Once suit is filed, a district court has jurisdiction only:

to enforce the requirement concerned and to impose any civil penalty provided for a violation of that requirement.

42 U.S.C. § 11046(c) (emphasis added). This is perhaps Congress's most telling indication that EPCRA citizen plaintiffs, like all other citizen plaintiffs, may not seek penalties separately from injunctive relief. The legislative history of citizen suit provisions, on which EPCRA's is based, also supports the conclusion that Congress did not intend citizen plaintiffs to bring penalty-only actions against parties that attain compliance before a suit is filed. The Sixth Circuit was likewise influenced by the differences between citizen and EPA enforcement mechanisms:

This difference between the grants of authority to the EPA and citizen plaintiffs is significant because it in-

dicates a congressional intent to limit citizen suits to ongoing violations and to give EPA sole authority to seek penalties for historical violations. . . . Although civil penalties for purely historical violations may be appropriate in some cases, the congressional scheme leaves to the EPA, with its broad perspective on the entire spectrum of enforcement and compliance, discretion to determine those violators whose conduct warrants such penalties.

United Musical, 61 F.3d at 475, 477.³ The court below disregarded this difference.

C. Citizens Plaintiffs Lack Standing to Sue for Past EPCRA Violations

To justify its decision not to apply *Gwaltney*, the Seventh Circuit emphasized that this Court relied on the Clean Water Act's definition of "citizen" to conclude that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." App. at A12-A13, citing *Gwaltney*, 484 U.S. at 59. The court noted that the Clean Water Act defines "citizen" as a "person . . . having an interest which is or may be adversely affected." App. at A12 (emphasis in original). Because EPCRA does not contain a definition of "citizen," the court appeared to suggest that, unlike with the Clean Water Act, Congress could not have intended EPCRA citizen suits to have only prospective application. App. at A12-A13.

It is not surprising that Congress defined citizen as it did in the Clean Water Act. By authorizing any "citizen" as so defined to bring an action, Congress intended to codify the

³ EPA's "broad perspective" is important, because EPA is equipped to fully appreciate whether an otherwise compliant company should be subject to the steep penalties that EPCRA provides. EPA does not seek penalties for every EPCRA violation.

liberalized grant of standing articulated by the Supreme Court in *Morton v. Sierra Club*, 405 U.S. 727 (1972). See S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3823; see also Boyer & Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 848 (1985). That EPCRA authorizes "any person" to bring a citizen suit does not change the fact that citizen suits must be prospective in nature because inherent in every congressional grant of standing are the constitutional requirements that a plaintiff suffer a concrete injury-in-fact and that the injury be redressable by a favorable decision. *Valley Forge*, 454 U.S. at 472.⁴ This constitutional "core" of standing is a minimum requirement "which not even Congress can eliminate." Scalia, *Doctrine of Standing*, 17 Suffolk U. L. Rev. 881, 885 (1983); see also *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975). Consequently, the requirement that a person have standing, i.e., "an interest which is or may be adversely affected," necessarily underlies every citizen suit provision, including EPCRA's, even though EPCRA explicitly authorizes "any person" to sue. 42 U.S.C. § 11046(a).

If there had been any doubt as to citizen standing requirements, a recent Court pronouncement resolves the question and solidifies the conclusion that citizen suits cannot target past violations. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In *Lujan*, this Court clarified that no

⁴ Only in the Clean Water Act did Congress use the term "citizen." Like EPCRA, the Clean Air Act, RCRA, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and the Toxic Substances Control Act ("TSCA") authorize "any person" to bring a citizen action. 42 U.S.C. § 7604(a); 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(a); 15 U.S.C. § 2619(a). There are other environmental citizen provisions, see *Hallstrom*, 493 U.S. at 23 n. 1, but those mentioned here have spawned the vast majority of citizen actions.

longer may Congress grant standing to sue to "any person" without also requiring a showing of injury-in-fact. Thus, a person who files suit seeking to require a government agency to undertake some action required by law must show something more than an ideological interest in the outcome. *Id.* at 562-571. Although *Lujan* involved a citizen suit against the government, this Court's reasoning applies with equal force to citizen suits against industry because a defendant's identity cannot alter Article III's requirements of injury and redressability:

As government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . . In exercising this power, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Id. at 580 (citations omitted) (Kennedy, J., concurring). If Congress has simply given standing to "any person," this requirement is not met. A would-be citizen plaintiff must point to a concrete injury, and not merely to a general congressional grant of standing. *Id.* at 580-81.

By its very nature, a past EPCRA violation lacks the immediacy and redressability necessary to confer standing on a citizen plaintiff. Nor does this case present a situation where Congress "has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff" who brings suit addressing past acts of fraud on the government. *Id.* at 572-73. Moreover and importantly, citizen suit provisions essentially vest prosecutorial authority in persons who, unlike state or federal

authorities, are not accountable to the electorate. *See also* Scalia, 17 Suffolk U. L. Rev. at 897-88 (the essential element that links the "intimately related" doctrines of standing and separation of powers is "the requirement of *distinctive* injury not shared by the entire body politic." (emphasis in original)). In light of such serious questions surrounding citizen suits for past EPCRA violations, the court should not have found implied authorization for such suits.

II.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

A. The Seventh Circuit Ignored the Similarities Between EPCRA and Other Environmental Citizen Suit Provisions

The Seventh Circuit erroneously concluded that EPCRA's citizen suit provision points to past violations. App. at A11-A13. The court of appeals sought to distinguish *Gwaltney*, but its efforts to do so—particularly its side-by-side comparison of the language of EPCRA's and the Clean Water Act's citizen enforcement provisions—are unconvincing. The question presented must be answered by analyzing Congress's reasons for establishing citizen suit provisions and then determining whether Congress intended to treat EPCRA differently.

The Seventh Circuit failed to acknowledge that Congress was not working off a blank slate when it drafted EPCRA's citizen suit provision. Using the citizen suit provision it created in the Clean Air Act amendments of 1970 as a model, Congress has included such provisions in virtually every piece of federal environmental legislation. Consequently, the citizen suit provisions in federal environmental laws resemble each other almost completely. *See Hallstrom*,

493 U.S. at 22-23 & n. 1; Boyer & Meidinger, 34 Buff. L. Rev. at 847-51.

Congress used its customary citizen suit model when it wrote EPCRA. As in the Clean Air Act, Clean Water Act, and RCRA,⁵ EPCRA requires a would-be citizen plaintiff to provide "notice of the alleged violation" to EPA, the state in which the alleged violation "occurs," and the alleged violator at least 60 days prior to filing suit. Like other environmental statutes, EPCRA prohibits citizen suits if the government has already brought an action to require compliance with the requirement at issue. EPCRA, like these other laws, provides for federal court jurisdiction without regard to the citizenship of parties or the amount in controversy, authorizes awards of attorneys' and expert witness fees, and allows intervention by the government and interested parties. Thus, EPCRA's citizen provisions are essentially the same as those in other statutes, including the Clean Air Act, the Clean Water Act, and RCRA.

Ignoring these similarities, the Seventh Circuit erred significantly in its interpretation of EPCRA's venue and notice provisions. The court rightly noted that Congress's use of the present tense in the Clean Water Act helped convince this Court that Congress did not intend to allow citizens to sue for past Clean Water Act violations. App. at A12-A13. However, the Seventh Circuit erroneously found support for its holding that EPCRA must be different in its simple assertion that, "The enforcement provisions of EPCRA are not likewise cast in the present tense." App. at A13. First,

⁵ Of the 17 environmental citizen suit provisions cited by the Court in *Hallstrom*, 493 U.S. at 23 & n. 1, these three are the most far-reaching and best known federal environmental statutes. The other 14 citizen suit provisions (one has since been repealed) also all contain a notice period provision and a bar to suit if the government is pursuing the matter.

the Seventh Circuit seized on EPCRA's venue provision, which provides that citizen suits "shall be brought in the district court for the district in which the violation occurred." App. at A13 (citing 42 U.S.C. § 11046(b)(1), emphasis in original). But the Seventh Circuit ignored the fact that Congress used this exact language in the venue provisions of RCRA, CERCLA, and TSCA,⁶ and yet courts have uniformly held, relying on *Gwaltney*, that these statutes do not allow citizen suits for past violations. See, e.g., *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193 (6th Cir. 1995) (CERCLA citizen suit must allege continuing violation); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2nd Cir. 1993) (same for RCRA); *Moreco Energy, Inc. v. Penberthy-Houdaille*, 682 F. Supp. 931, 932 (N.D. Ill. 1988) (same for TSCA).⁷

The Seventh Circuit next focussed on the notice provision itself, which requires that the citizen send the notice of intent to sue to EPA, the alleged violator, and the state "in which the alleged violation occurs." App. at A13 (citing 42 U.S.C. § 11046(d)(1), emphasis in original). Again, the court ignored the fact that Congress has used this exact language in the seven environmental citizen suit provisions which require notice to a state, including those that this Court found cannot support an action for past violations. Astonishingly, the court of appeals even went so far as to find that the word "occurs" is somehow not "cast in the present tense." App. at A13. This is an obviously strained reading of the differences between the Clean Water Act and EPCRA, and an unfair parsing of language to reach a con-

⁶ 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(b)(1); 15 U.S.C. § 2619(a).

⁷ The Clean Water Act and the Clean Air Act provide for suit in the district "in which such source is located," (33 U.S.C. § 1365(c)(1); 42 U.S.C. § 7604(c)(1)), which is simply another way of phrasing "in which the violation occurred."

clusion unsupported by this Court's previous holdings and the intent of Congress in establishing citizen suits.

In further explaining its reasoning not to apply *Gwaltney*, the court noted that the Clean Water Act allows citizens to sue for violations "of a permit which *is* in effect" and also permits a state's governor to sue if a violation "*is occurring* in another State and *is causing* an adverse effect on the public or welfare in his State." App. at A12 (emphasis in original). The Seventh Circuit's analysis stopped there, however, and it failed to realize that Congress could not have used such language in EPCRA because: 1) EPCRA does not require permits; and 2) since EPCRA requires only the submission of information, an EPCRA violation necessarily could not involve the kinds of migrating contamination regulated under the Clean Water Act as might affect another state. "EPCRA does not restrict the manufacturing, processing, use or disposal of any chemical; it is simply a reporting statute. . . ." *National Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1197 (D.C.C. 1996). The Seventh Circuit thus failed to comprehend the differences between EPCRA and the Clean Water Act and that *Gwaltney* prohibits a citizen suit for a cured violation, but not for one that is continuing.

B. Complying with EPCRA Takes Much More Than a "Minimal Effort"

The court below reasoned that Congress must have intended a citizen to sue for past violations because, if the Sixth Circuit were correct, "citizen suits could only proceed when a violator receives notice of intent to sue and still fails to spend the minimal effort required to fill out the forms and send them in." Citizens therefore would have no reason "to incur the costs of learning about EPCRA. . . ." App. at A14.

Contrary to the court's assertion, completion of EPCRA forms is no simple matter. It is also a more laborious matter for those companies, especially small businesses, that cannot assign personnel to deal solely with environmental compliance. Completing the forms, especially the Section 313 Form R, requires the collection and computation of detailed information regarding a company's operations and practices. EPA itself estimates the public reporting burden for Section 313 familiarization, compliance determination, calculation, completion and recordkeeping to be 124.5 hours in the first year, 61 Fed. Reg. 33588, 33617 (June 27, 1996), or over three working weeks for a single employee, not considering that employee's other duties, hardly a simple matter. EPA recognizes that large facilities may require even more than the average time to comply. *Id.* at 33614.

The completion of Section 312 forms also requires collection and recording of detailed information because some chemicals fall into more than one hazard category and also the reporting of chemical mixtures may complicate the process.⁸ See 40 C.F.R. § 370.40-41 (if a chemical is part of a mixture, a party may report "either the weight of the entire mixture or only the portion that is a particular hazardous chemical. . . .") EPA admits that even its rule explaining how to calculate chemical mixtures under Section 312 "may have confused the regulated community. . . ." *Confusion About EPCRA Rule Acknowledged*, Chemical Regulation Reporter, Aug. 17, 1990, at 802. EPA estimates that there are over 500,000 chemicals or products which are subject to the Section 312 reporting requirements. *Title III List of Lists: Consolidated List of Chemicals Subject to EPCRA*, EPA, June 1994, at 1 n. 1. And EPA attributes many

⁸ EPA has not provided the regulated community with an estimate of the public reporting burden for Section 312 compliance.

EPCRA compliance problems to "gray areas in the law" that make reporting requirements confusing for both EPA and industry. *EPA Eyes Changes to EPCRA Regulations to Clarify "Gray Areas," Increase Compliance*, Toxics Law Reporter, March 9, 1994, at 1132.

Because of EPCRA's complexity, companies that receive an EPCRA notice letter may not be able to easily comply and submit the required forms within the 60-day notice period. To those companies, including the Petitioner, whose burden is great and resolve to cure the violation is strong, Congress offers an opportunity to come into compliance during the 60-day period, thus avoiding a citizen suit and leaving to EPA's "broad perspective" whether enforcement is truly necessary. This makes EPCRA no different from other environmental statutes where, if a violation is cured within 60 days, citizen enforcement is barred.

EPCRA is also no different from other environmental statutes in that Congress did not guarantee citizens recovery of their costs of identifying alleged violators. A citizen group always runs the risk that a party will be able to cure the alleged violation before the group files suit. The Seventh Circuit's decision guarantees EPCRA plaintiffs the possibility of recovering their costs in any EPCRA suit, however trivial, a result that Congress could not have intended.

Moreover, should a company simply "throw" reports together in an attempt to fend off a citizen suit, it opens itself up to a wide range of civil and criminal penalties. EPA considers the submitting of incomplete forms to be serious violations, which can bring penalties as high as \$16,500 per day. EPA EPCRA Section 312 Policy at 15-20; EPA EPCRA Section 313 Policy at 11-12. In addition to running the risk of civil penalties for filing incomplete or misleading forms, a company also runs the risk of criminal prosecution. 18

U.S.C. § 1001; Section 313 Policy at 7; see also *United States v. Murphy*, 935 F.2d 899, 900 (7th Cir. 1991) (submitting false information under a federal statute to a state agency also supports prosecution under 18 U.S.C. § 1001; Section 312 forms are submitted only to state and local agencies.)

III

THE QUESTION PRESENTED IS IMPORTANT

Numerous reporting deadlines exist under other environmental statutes, and, if a party receives a citizen notice regarding a failure to report and then complies within the 60-day notice period, no citizen suit is authorized under the direction of this Court in *Gwaltney*.⁹ It does not make sense that Congress, without explicitly mandating such a result, would authorize citizens to sue for past EPCRA reporting violations but not for past violations under other statutes. One absurd result of the Seventh Circuit's decision is that if a facility does not immediately report a release, but does so upon receiving a notice letter, a citizen plaintiff could still sue under EPCRA, but not under CERCLA. See 42 U.S.C. §§ 11004(a)(1 & 3), 11046(a)(1)(A)(i) (certain releases require reporting under both EPCRA and CERCLA).

Because paperwork, rather than substantive, violations are the easiest to prove, citizen groups readily file suits alleging this kind of violation. Greve, *The Private Enforcement of Environmental Law*, 65 Tulane L. Rev. 339, 365-66 (1990). Some observers have found that, "Enforcement pro-

⁹ See, e.g., 33 U.S.C. §§ 1321(b)(5), 1342(a)(2) (requirements for reporting oil discharges and violations of permitted effluent limitations under Clean Water Act); 42 U.S.C. § 7414 (Clean Air Act); 42 U.S.C. § 9603 (CERCLA requirements for reporting released substances).

ceedings brought for violations of the voluminous paperwork requirements of the Clean Water Act generate tens of thousands of dollars in attorneys' fees but no discernible environmental benefits." *Id.* at 366. This lack of environmental benefit is even more pronounced under EPCRA because EPCRA does not restrict the use or disposal of any substance; it is simply a reporting statute.

Contrary to Congress's concern that the federal courts not be flooded with unnecessary citizen suits, the Seventh Circuit's opinion flings open the doors of federal courthouses to such actions. Not only can citizen groups file suit if a company, like the Petitioner, achieves compliance within the 60-day notice period, but a citizen group can also search old government records to determine which companies filed late EPCRA reports and then sue.

For example, a small manufacturer, in compliance with numerous environmental, health and safety requirements, is not in compliance with EPCRA because it does not know EPCRA exists. The company then discovers it is subject to EPCRA and submits the required reports. A year or two later, in searching government records, a citizen group finds the company's EPCRA filings and sends a notice alleging that the company has violated EPCRA. If the company does not settle on the terms demanded by the citizen group, it must defend a lawsuit in federal court. Moreover, if suit is filed, the citizen group has no problem proving liability. Like other environmental statutes, EPCRA is a strict liability statute, and, according to the Seventh Circuit, an EPCRA violation even if cured remains sufficient to allow a citizen suit in federal court. The citizens group has an ironclad lawsuit and will seek to recover its costs and fees as the "prevailing party." 42 U.S.C. § 11046(f).

Congress could not have intended to permit citizen groups to exhume past violations and then bring penalty actions

based on those violations. Yet that is what the decision below allows. Such actions do not abate any violation—by definition, the violation has already been corrected. Nothing is gained by such a suit (with the exception of the citizen group possibly recovering hefty attorneys' fees). A party's resources will be consumed defending an unnecessary lawsuit—resources that could be used to create jobs and benefit the community. The federal judiciary should not be burdened by hearing such moot controversies and instead should concentrate on live disputes in need of resolution.

If the decision below is allowed to stand, it will doubtless precipitate a substantial increase in the volume of EPCRA citizen suits. Immediately after the Seventh Circuit announced its decision, counsel for CBE predicted "a continuation of citizen suits as a result of the Seventh Circuit's ruling." *Lawsuits for Past EPCRA Violations Valid, Court Says, Creating Federal Circuits Split*, Toxics Law Rep., July 31, 1996, at 267. Not surprisingly, in only the first month following the Seventh Circuit's decision, CBE sent out at least seven new EPCRA notices of intent to sue to companies in Chicago and northern Illinois alone. If other citizen groups throughout the country follow suit, as they are likely to do, there will be hundreds, and perhaps thousands, of new EPCRA notice letters and potential federal court actions.

Even before the Seventh Circuit's decision, citizen organizations were extremely active in pursuing EPCRA litigation. Ten such groups filed a joint *amicus* brief in support of CBE's appeal to the Seventh Circuit stating that they research "public files to identify companies which have failed to file required EPCRA reports and have brought citizen suits against such companies." The Seventh Circuit's decision makes their pursuit of EPCRA litigation much easier and will certainly spur more activity.

Unlike the plethora of other environmental and health and safety statutes, EPCRA is a lesser known statute, especially among small businesses, perhaps reflecting EPA's priorities. EPA has estimated that of the approximately 30,000 facilities required to file Section 313 reports, over one-third did not do so. General Accounting Office, *EPA's Toxic Release Inventory Is Useful but Can Be Improved*, at 49 (June 1991) GAO/RCED 91-121. Citizen groups therefore have seized upon EPCRA as a fail-safe, guaranteed funding mechanism. One such group, Don't Waste Arizona, has sent over 90 EPCRA notices to companies in Arizona since 1992, filed at least 12 complaints in federal court, settled with several companies before filing suit, and has yet to resolve its disputes with another 40.¹⁰ *Nonprofit Cashing in on Lawsuits*, The Business Journal-Phoenix, June 21, 1996, at 1, 38. Because proving EPCRA violations is no difficult task, the head of Don't Waste Arizona:

has latched onto another strategy to pay his bills: He sues unsuspecting small businesses and forces them to meet stringent Environmental Protection Agency guidelines that most didn't even know existed. . . . It's a strategy that's given Don't Waste Arizona an annual budget of close to \$80,000. . . .

Id. at 38.

Given the prospect of potentially ruinous penalties for what is an easily-proved strict liability offense, in addition to a possible award of a plaintiff's attorney's fees, business entities invariably find themselves compelled to yield to the citizen group's demands. The judicial extension of citizen suit jurisdiction to past violations makes this practice so lucrative because there is nothing a defendant, having al-

¹⁰ Don't Waste Arizona is one of the ten citizen groups that joined in an *amicus* brief in support of CBE's appeal to the Seventh Circuit.

ready achieved compliance, can do to defeat the plaintiff's action. Citizen groups thus have enormous leverage, and little to lose and much to gain simply by reviewing government records to determine which companies are easy litigation targets.

A regulation recently proposed by EPA will add seven major industry groups to the list of facilities already subject to Section 313 reporting requirements and EPA estimates that 6,400 additional facilities will now be faced with this additional reporting burden. 61 Fed. Reg. 33588, 33610. If history is a guide, many of these facilities, already highly-regulated, will be caught unaware of the new requirements and provide citizen groups with a vastly increased number of facilities to sue.

Review of the decision below is also important because of the burden it places on the already highly regulated community. If the court below is correct in determining that Congress intended a past EPCRA violation, however small or remote, and since corrected, to be sufficient to subject a company to a citizen suit, then industry should have a definitive answer so it will not expend resources litigating whether such a suit is proper in the first instance. Congress enacted uniform and comprehensive environmental laws to operate nationwide without difference as to a state or region. The split in the circuits now upsets that national balance. This Court's jurisdiction is required to resolve the uncertainty created by the conflict between the circuits and to interpret the decisions of this Court as they apply to EPCRA.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

A1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1136

CITIZENS FOR A BETTER ENVIRONMENT,
a not for profit corporation,

Plaintiff-Appellant,

v.

THE STEEL COMPANY, a/k/a Chicago Steel
and Pickling Company, a corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 4534—George M. Marovich, Judge.

ARGUED MAY 29, 1996—DECIDED JULY 23, 1996

Before ESCHBACH, ROVNER, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* In this case we examine for the first time the citizen enforcement provisions of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). EPCRA was passed into law as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and is codified at 42 U.S.C. § 11001 *et seq.* While awareness of SARA is quite high, EPCRA remains one of the lesser-known environmental statutes. Only about 20 federal cases have been decided under EPCRA since its enactment, and only one court of appeals has ruled

on the question before us in this case. See *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995). Many industrial companies subject to the Act remained unaware of its existence long after it went into effect. GAO, Report to Congress, *Toxic Chemicals—EPA's Toxic Release Inventory is Useful but Can Be Improved* (June 1991). Some discussion of the Act's history and goals may therefore be in order to put this case in context.

In 1984, over 2,000 people were killed and countless injured when a Union Carbide facility in Bhopal, India, unexpectedly released the toxin methyl isocyanide into the environment. This tragedy, combined with smaller incidents closer to home, focused increased attention on the presence of toxic chemicals in our communities, and on the lack of reliable, accessible information regarding the location and use of these chemicals. EPCRA was passed primarily as a means of filling this informational void and improving emergency response capabilities.

The information compiled under the statute has also been put to many creative uses and led to some unexpected results. For example, releases of toxic chemicals have been reduced nearly 43 percent since 1988, the baseline year against which annual reports are measured. EPA, *Environmental News* 1 (Mar. 27, 1995). Some observers have found "reason to believe that the public release of information about discharge of toxic chemicals has by itself spurred competition to reduce releases, quite independently of government regulation." Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1 (1995).

As the name of the statute suggests, EPCRA has two main purposes. The first, the "Right-to-Know" component, aims to compile accurate, reliable information on the presence and release of toxic chemicals and to make that information available at a reasonably localized level. In furtherance of this goal, EPCRA sets up a reporting scheme whereby users of specified toxic chemicals must inventory

the chemicals used in their facilities on an annual basis. Chemical inventory reporting requirements are found at EPCRA § 312 (42 U.S.C. § 11022). Facilities releasing specified chemicals into the environment must report these releases annually as well, and detailed requirements for reporting chemical releases are set out at EPCRA § 313 (42 U.S.C. § 11023). The case before us arose from an attempt to enforce the reporting requirements of §§ 312 and 313, and the text of those sections is set out at length later in our opinion.

EPCRA is concerned not just with gathering information, but with making that information available in a comprehensible form. In furtherance of this goal, the EPA is charged with establishing and maintaining a publicly accessible computer database using information reported under EPCRA and otherwise disseminating reported information to the public. State and local organizations must also make information reported under EPCRA readily available to the public. (For those who are interested, the complete EPA Toxic Release Inventory database is available online through the National Library of Medicine's TOXNET system.) Information gathered under EPCRA may be used by the public to identify environmental concerns and to encourage industrial users of toxic chemicals to reduce the risks associated with their use. Industrial users can use the information to identify opportunities for savings. Government organizations at all levels can use the data to "compare facilities or geographic areas, to identify hotspots, to evaluate existing environmental programs, to more effectively set regulatory priorities, . . . to track pollution control and waste reduction progress . . . [and] identify potential environmental justice concerns." Office of Pollution Prevention & Toxics, EPA, Public Data Release, *1993 Toxic Release Inventory* (March 1995), p. 4.

The second primary purpose of the Act, the "Emergency Planning" component, is to use the reported information to formulate emergency response plans, again at the local level, in order to limit damage resulting from the

accidental release of toxic chemicals. The Act calls for the establishment in each state of a State Emergency Response Commission. These commissions, referred to as SERCs, must appoint and supervise Local Emergency Planning Committees. The LEPCs, as they are called, must consist of representatives from community organizations, regulated industries, state and local government, fire departments, the media, and other groups. Each LEPC is charged with formulating emergency response plans for its community, based in part on information reported under EPCRA.

While the statute mandates the creation of state and local commissions and requires those organizations to take certain actions, the only burdens EPCRA places on industry are the reporting requirements. Because most of the required information must be compiled and reported for other purposes, the cost of compliance with EPCRA's reporting requirements is low. EPCRA § 313, for example, which requires reporting of releases of toxic chemicals, explicitly states that "[n]othing in this section requires the monitoring or measurement of the quantities, concentration, or frequency of any toxic chemical released into the environment beyond that monitoring and measurement required under other provisions of law or regulation." 42 U.S.C. § 11023(g)(2). Likewise, the reporting requirements of EPCRA § 312 only apply to facilities already subject to certain reporting requirements of the Occupational Safety and Health Act. 42 U.S.C. § 11022(a). Because EPCRA requires little additional effort by regulated facilities, the estimated annual fixed unit costs of § 312 compliance total \$326.09, and the estimated variable unit costs range from \$43.50 to \$146.81. U.S. EPA EPCRA Section 312 Penalty Policy (June 13, 1990), at 29.

In drafting EPCRA, Congress provided a full range of enforcement options. The EPA may seek redress of EPCRA violations through civil or administrative remedies, or may seek criminal penalties. In addition, the authority to bring civil actions seeking declaratory and injunctive relief, as well as civil penalties for specified violations of the Act,

is conferred on SERCs, LEPCs, and state and local governments.

Most relevant to this case, EPCRA grants enforcement authority to ordinary citizens, who may sue in the federal district courts after giving 60 days notice to the alleged violator, the EPA, and state authorities. EPCRA's citizen suit provision is found at 42 U.S.C. § 11046, and states:

§ 11046. Civil actions

(a) **Authority to bring civil actions.** (1) Citizen suits. . . . [A]ny person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

. . . .

(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.

(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title. 42 U.S.C. § 11046.

Turning to the sections referred to in the citizen suit provision, we see that they include specific information regarding who must file, where those filings must be submitted, and the timetable in which initial and subsequent filings must take place. Title 42, U.S.C. § 11022 (EPCRA § 312) sets forth reporting requirements for facilities which use toxic chemicals. That section states:

§ 11022. Emergency and hazardous chemical inventory forms

(a) **Basic requirement.** (1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health

Act of 1970 and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this title referred to as an "inventory form") to each of the following:

- (A) The appropriate local emergency planning committee.
 - (B) The State emergency response commission.
 - (C) The fire department with jurisdiction over the facility.
- (2) The inventory form . . . shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year. 42 U.S.C. § 11022.

Title 42, U.S.C. § 11023 (EPCRA § 313) requires facilities to report releases of toxic chemicals into the environment:

§ 11023. Toxic chemical release forms

(a) **Basic requirement.** The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the [EPA] Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year. 42 U.S.C. § 11023.

If, after receiving notice of a private citizen's intent to sue, the EPA chooses to pursue a case, the proposed citizen suit is barred. If the EPA takes no action, citizens acting as "private attorney generals" may seek declaratory and injunctive relief and civil penalties. Civil penalties

assessed against a violator in a citizen suit are not paid to the plaintiff; they are paid into the U.S. Treasury. The court may in its discretion award the costs of litigation to the prevailing or substantially prevailing party.

Violations of §§ 312 and 313 are punishable by civil penalties of up to \$25,000 per violation. Every day that a facility fails to comply with the requirements of these sections is considered a separate violation. Likewise, failure to report to each person or organization designated under EPCRA constitutes a separate violation. For example, failure to report under § 312 for a single day would constitute multiple violations; failure to report to the LEPC, failure to report to the SERC, and failure to report to the local fire department would each be an individual violation. At first glance, it seems that the penalties for relatively minor violations would mount up at a staggering rate. The EPA's formal penalty policy, however, shows that the Agency really views \$25,000 as a maximum penalty, reserved for only particularly egregious violators. The penalty policy, sort of like the federal sentencing guidelines in criminal cases, takes into consideration a number of statutorily mandated factors, including the seriousness of the violation, the size of the violator, the quantity of toxic chemicals used, prior history of violations, the violator's "attitude," ability to pay, and other factors. These factors yield a "penalty policy matrix," which is used to determine an offender's base penalty. The base amount can range from \$200 to the full \$25,000. The base penalty is assessed for the first day of violation, while subsequent days are fined at a lower rate according to a formula which takes into account the number of days of violation and the base penalty. *See generally* U.S. EPA EPCRA Section 312 Penalty Policy (June 13, 1990); and U.S. EPA EPCRA Section 313 Penalty Policy (Aug. 10, 1992).

In 1995, Citizens for a Better Environment, a not-for-profit environmental organization, uncovered what it believed to be multiple violations of EPCRA §§ 312 and 313. The alleged violator is The Steel Company, a manufacturer and pickler of steel located on the southeast side

of Chicago. CBE gave notice of intent to sue to The Steel Company, the EPA, and appropriate Illinois authorities on March 16, 1995. The notice alleged that The Steel Company used and released toxic chemicals covered by the EPCRA reporting requirements, and didn't, since the enactment of EPCRA, submit an inventory form as required by § 312 or a toxic chemical release form as required by § 313. (During oral argument, we asked if the company in fact had not filed, and we were told, by the company's lawyer, that the claim was true.) Upon receiving notice of CBE's intent to sue, the company filed its overdue forms with the designated agencies. The EPA did not initiate enforcement proceedings within the 60-day notice period, and CBE filed its complaint in this case in federal district court on August 7, 1995.

The Steel Company filed a motion to dismiss for failure to state a basis of jurisdiction and failure to state a claim upon which relief may be granted. In support of its motion, the company argued that any violations of the Act it may have committed were wholly in the past. Its filings were up to date at the time CBE filed its complaint in the district court, and The Steel Company argued that EPCRA did not authorize citizen suits for "historical" violations. CBE argued that EPCRA authorized citizen suits to enforce the requirements of the Act, including the requirement that filings be submitted annually on or before the dates set forth in the statute. The district court agreed with The Steel Company's interpretation of EPCRA's citizen suit provision and dismissed the case. CBE now appeals. Amicus briefs have been filed in support of CBE's interpretation of the statute by the United States and several other interested groups.

The district court's decision in this case relied almost exclusively on the Sixth Circuit's 1995 decision in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, noted in the opening paragraph of our opinion. This reliance was not misplaced—*United Musical Instruments* is factually indistinguishable from this case. It is also the only appellate court decision addressing the

central question of this case: whether citizens may seek penalties against EPCRA violators who file after the statutory deadline, after receiving notice of intent to sue, but before a complaint may be filed in the district court. The Sixth Circuit held in *United Musical Instruments* that EPCRA authorized citizen suits only for failure to "complete and submit" forms, no matter when those forms were completed or submitted. EPCRA's "citizen suit provision speaks only of the completion and filing of the form. The form is completed and filed even if it is not timely filed." *United Musical Instruments*, 61 F.3d at 475. Relying on *United Musical Instruments*, the district court in this case held that because The Steel Company completed and submitted the required forms by the time CBE filed its complaint, the citizen suit was barred.

United Musical Instruments relied in turn on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), in which the Supreme Court interpreted the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* In *Gwaltney*, the Supreme Court held that the CWA's citizen suit provisions did not allow citizens to sue for "wholly past" or "historical" violations. In reaching its decision, the Court looked first and foremost to the plain language of the statute. The CWA citizen suit provision interpreted in *Gwaltney* stated that private parties could bring civil actions against any person alleged "to be in violation" of permits required under the statute. The Court found that the "most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation," *Gwaltney* at 57, and concluded that citizens "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Gwaltney* at 59.

The *Gwaltney* Court looked at the language of the rest of the CWA citizen suit provision, and found that "[o]ne of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout" *Gwaltney* at 59. Its decision bolstered by the "undeviating use of the present tense," *Gwaltney*

at 59, the Court turned to the Act's 60-day notice provision for further support. Finding that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance . . . and thus likewise render unnecessary a citizen suit," *Gwaltney* at 60, the Court said that the notice provision would be rendered meaningless if citizens could sue for "wholly past" violations.

The Sixth Circuit in *United Musical Instruments*¹ and the district court in this case took the literal holding of *Gwaltney*—that the citizen suit provision of the Clean Water Act did not permit suits for violations that had been cured prior to the filing of a complaint—and applied it by analogy to the citizen suit provision of EPCRA. We follow a different line of reasoning.

Rather than applying the holding of *Gwaltney* directly, we apply the interpretive methodology of that case. We examine the statute before us in light of criteria the *Gwaltney* Court used to analyze the citizen suit provisions of the Clean Water Act. Tracking the reasoning of the Supreme Court in *Gwaltney*, we see that the first teaching of that case is to read a statute according to its most plain and natural meaning. "It is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Gwaltney* at 56 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). This fundamental principal of statutory interpretation led the Supreme Court to focus on the words "to be in violation" in the Clean Water Act. Even these words, however, were found to contain some ambiguity. *Gwaltney* at 57.

¹ Because we disagree with the Sixth Circuit's interpretation of the citizen enforcement provisions of EPCRA in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A.*, 61 F.3d 473 (6th Cir. 1995), this opinion has been circulated among all judges of the court in regular service as required by Circuit Rule 40(f). No judge has voted to hear the case *en banc*.

Every district court that looked at the citizen suit provisions of EPCRA prior to *United Musical Instruments* distinguished the case before it from *Gwaltney* and the Clean Water Act. See, e.g., *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745 (W.D.N.Y. 1991); *Delaware Valley Toxic Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132 (E.D. Pa. 1993); *Williams v. Leybold Technologies*, 784 F. Supp. 765 (N.D. Cal. 1992). The Sixth Circuit rejected this distinction, calling it a "hypertechnical parsing of the language of the statutes," *United Musical Instruments* at 477, and the district court in this case followed its lead. But the language of EPCRA differs from the language interpreted in *Gwaltney*; EPCRA authorizes citizens to sue "for failure to" comply with the statute while the Clean Water Act authorized citizen suits where a defendant was alleged "to be in violation." The plain language of the EPCRA citizen enforcement provision does not point clearly to the present tense as its counterpart does in the Clean Water Act. In fact, it does the opposite. The language of EPCRA contains no temporal limitation; "failure to do" something can indicate a failure past or present.

Looking beyond verb tenses, EPCRA's citizen enforcement provision authorizes citizens to sue "for failure to complete and submit" forms "under" §§ 312 and 313. 42 U.S.C. § 11046(a)(1)(A). While the *United Musical Instruments* court found that the use of the words "complete and submit" precluded a citizen suit alleging that violations existed even where forms had been completed and submitted, we disagree. Congress must be assumed to have included the words "under" §§ 312 and 313 for a reason. The most natural reading of "under" a section is "in accordance with the requirements of" that section. It is simply a way to incorporate the requirements of the referenced section without listing them all over again. We read the provision as authorizing citizen suits not only for failure to complete and submit forms, but for failure to complete and submit forms in accordance with the requirements set forth in the referenced sections. One of these

requirements is the statutory mandate that forms filed under § 312 "shall be" submitted annually by March 1. Section 313 forms "shall be" submitted by July 1 of each year. These are not guidelines or suggestions; they are essential elements of the provisions citizens have authority to enforce.² Any other interpretation "would render gratuitous the compliance dates for initial submissions which Congress placed in EPCRA's reporting provisions." *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 750 (W.D.N.Y. 1991).

After closely reading the citizen suit provision, the *Gwaltney* Court looked further, to the language of the Clean Water Act enforcement provision as a whole. The Court noted that the CWA allowed citizens to sue "for violation of a permit 'which is in effect.'" *Gwaltney* at 59 (quoting 33 U.S.C. § 1365 (f)). The Clean Water Act also permitted the governor of a state to sue as a citizen where a violation "is occurring in another State and is causing an adverse effect on the public health or welfare in his State." *Gwaltney* at 59 (quoting 33 U.S.C. § 1365(h)). A citizen was defined as "a person . . . having an interest which is or may be adversely affected" by the defendant's violations of the Act." *Gwaltney* at 59 (quoting 33 U.S.C. § 1365 (g)). The Court concluded from the "undeviating use of the present tense" that "the harm sought

² EPCRA's legislative history makes it clear that Congress placed great importance on the timing element of the reporting requirements. See Senate Committee on Environment and Public Works, *Superfund Improvement Act of 1985*, S. Rep. No. 11, 99th Cong., 1st Sess., 14-15 (Mar. 18, 1985) (noting that the goal of EPCRA is to make "essential" information "available widely and in a timely fashion"); H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1, p. 111 (1985); ("Once the material safety data sheets are developed, it is crucial that they be made available to the public in the quickest, most efficient way possible."); accord 132 Cong. Rec. 29747 (Oct. 8, 1986) (statement by Rep. Sikorski) ("Disclosure of hazardous waste emissions . . . must be swift and complete. The requirements for disclosure . . . must be strictly and strenuously enforced." (Emphasis added.)).

to be addressed by the citizen suit lies in the present or the future, not in the past." *Gwaltney* at 59.

The enforcement provisions of EPCRA are not likewise cast in the present tense. EPCRA provides that citizen suits "shall be brought in the district court for the district in which the alleged violation occurred," 42 U.S.C. § 11046(b)(1); and that notice of intent to sue must be given to the EPA, the alleged violator, and "the State in which the alleged violation occurs." 42 U.S.C. § 11046(d)(1). Nowhere does EPCRA contain the "is occurring" language of the CWA to indicate that citizens must allege an ongoing violation. The presence of such language in the CWA shows that Congress knows how to require allegations of an ongoing violation as a condition of a citizen suit when it sees fit. The absence of language limiting citizen suits to ongoing violations, and Congress' choice of language specifically referring to past violations, are strong indicators that a cause of action exists under EPCRA for violations that are not ongoing at the time a citizen complaint is filed.

The *Gwaltney* decision also cited CWA's 60-day notice provision as a reason for its holding. The Court reasoned that, in the context of the Clean Water Act, the only rationale for the notice provision was to allow violators to bring themselves into compliance. Allowing citizens to sue after violations ceased would defeat the purpose of the notice provision and undercut the EPA's enforcement discretion. The Court stated that it "cannot agree that Congress intended such a result." *Gwaltney* at 61. This line of reasoning is no longer as compelling as it was when *Gwaltney* was decided. Since then, Congress has expressly intended precisely that result. The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, contains a notice provision just like the one in the Clean Water Act. In 1990 Congress amended the Clean Air Act to permit citizen enforcement actions for past violations, yet left the notice provision intact.

Recognizing that citizens may sue under EPCRA even after violators have submitted overdue filings does not render the notice provision gratuitous. Notice gives an

alleged violator a chance to correct the citizen's information if the citizen is mistaken about the existence of a violation. Because each day of an EPCRA violation is a separate violation carrying additional penalties, notice gives a violator the opportunity to limit its exposure by filing late reports. The notice provision preserves the EPA's enforcement discretion, giving the Agency a chance to take enforcement action if it chooses. Notice also conserves resources by giving violators the opportunity and the incentive to enter into settlement negotiations with citizens or the EPA. As we noted in *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 974 F.2d 1320, 1322 (7th Cir. 1992), a key rationale for the notice provision of another environmental statute was to require a "would-be champion to try negotiation before litigation." That rationale applies with no less force to the notice provision in EPCRA.

On a broader scale, we must interpret the specific language of the citizen suit provision in a way that gives meaning to the provision as a whole. The incentives created by the district court's interpretation would render the citizen enforcement provision virtually meaningless. EPCRA creates a structure that encourages private citizens to invest the resources necessary to uncover violations of the Act by allowing courts to award the costs of enforcement to prevailing or substantially prevailing parties. (It should be noted that this same structure discourages frivolous citizen suits; it does not limit awards of costs to plaintiffs.) If citizen suits could be fully prevented by "completing and submitting" forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. Put simply, if citizens can't sue, they can't recover the costs of their efforts.

If the interpretation advanced by the Sixth Circuit and adopted by the district court is correct, citizen suits could only proceed when a violator receives notice of intent to sue and still fails to spend the minimal effort required to fill out the forms and turn them in. This would large-

ly shift the cost of EPCRA compliance from regulated industrial users to private citizens. Private citizens would have to absorb much of the cost of monitoring chemical use and keeping up to date on changes in EPCRA requirements, with little or no hope of recovering those costs through awards of litigation expenses. Private enforcement of the reporting requirements would undoubtedly drop off. This scenario is impossible to reconcile with the clearly expressed intent of Congress, or with the very existence of the citizen enforcement provision.

The decision of the district court is reversed and the case remanded for further proceedings.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

A16

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: July 23, 1996

BEFORE:

Honorable JESSE E. ESCHBACH, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

No. 96-1136

CITIZENS FOR A BETTER ENVIRONMENT,
a not for profit corporation,

Plaintiff-Appellant

v.

STEEL COMPANY, a corporation, also known
as CHICAGO STEEL & PICKLING COMPANY,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 95 C 4534—George M. Marovich, Judge

The decision of the District Court is REVERSED, with costs, and the case is REMANDED for further proceedings in accordance with the decision of this court entered on this date.

A17

[Dated December 19, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITIZENS FOR A BETTER
ENVIRONMENT, a not for
profit corporation,

Plaintiff,

v.

THE STEEL COMPANY,
a/k/a CHICAGO STEEL AND
PICKLING COMPANY,
a corporation,

Defendant.

No. 95 C 4534

Judge
George M. Marovich

MEMORANDUM OPINION AND ORDER

The plaintiff, Citizens for a Better Environment ("CBE"), brought this suit against the defendant, The Steel Company ("Steel Company"), for alleged violations of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11001, *et seq.* Steel Company now moves to dismiss the action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons set forth below, this Court grants Steel Company's motion.

I. BACKGROUND

Amid growing concern for the preservation of the environment, Congress enacted EPCRA in 1986. The Act

requires industrial firms to inventory and report their use of certain chemicals and of the amounts of toxic emissions to the United States Environmental Protection Agency ("EPA") and designated state officials. 42 U.S.C. §§ 11022, 11023. Because these agencies use these disclosures to identify polluters that need to be stopped from further damaging the environment, the failure to file the reports required by EPCRA may subject non-complying firms to the possibility of prosecution by the EPA, including civil penalties of up to \$25,000 for each violation. 42 U.S.C. § 11045(c)(1).

Additionally, if the EPA chooses not to prosecute, § 326(a) of EPCRA provides for citizen enforcement by allowing them to sue offending firms directly in the District Court. 42 U.S.C. § 11046(a). Prevailing parties may recover reasonable costs and attorneys' fees. 42 U.S.C. § 11046(f). A citizen suit may not be commenced, however, until sixty days after the citizen provides notice of the alleged violation to the EPA, designated state officials, and the alleged violator. 42 U.S.C. § 11046(d). If the EPA chooses to address the alleged violation either administratively or in federal court, the citizen may not bring her action. 42 U.S.C. § 11046(e).

CBE is a not-for-profit environmental protection organization based in Illinois. The group has a membership of approximately 30,000 people, a large portion of whom live in the Chicago area. The organization claims to attempt to prevent environmental health threats through research, public education and citizen involvement. Its members use information reported under EPCRA to learn about toxic and other chemicals that are released into their communities.

Steel Company is an Illinois corporation that operates industrial steel manufacturing facilities on Chicago's South Side. As a part of its operations, Steel Company removes rust from steel coils, a process known as "steel pickling."

CBE alleges that by virtue of its use and disposal of certain chemical agents, including Hydrochloric Acid, Sodium Hydroxide, and Ferrous Chloride, Steel Company falls under the parameters of § 312 and § 313 of EPCRA, 42 U.S.C. §§ 11022, 11023 and is therefore required to file annual reports. CBE alleges that in spite of this requirement, Steel Company had not filed any EPCRA reports from 1987 to 1995.

On March 16, 1995, CBE gave notice of Steel Company's alleged violation of the Act and of CBE's intent to sue to the EPA, the Illinois EPA, the Illinois Governor, and Steel Company. Because the EPA had not initiated an enforcement proceeding after the mandatory waiting period, CBE filed suit against Steel Company under § 326(a) of EPCRA. 42 U.S.C. § 11046(a), on August 7, 1995.

Steel Company brings this motion to dismiss, claiming that it has complied with EPCRA's reporting requirements. Specifically, Steel Company alleges that, after receiving CBE's intent to sue in March 1995, it filed the required reports with the appropriate agencies, bringing itself up to date through 1995. With the filing of the reports prior to CBE's initiation of the suit, Steel Company claims that it has cured its previous non-compliance with the Act, thereby denying this Court jurisdiction to entertain a suit by CBE, a citizen, for any present reporting violation. The only remaining allegations, that of late

filings, is considered a "historical" violation, which is not authorized as a citizen suit under the Act.

II. DISCUSSION

Steel Company seeks to dismiss CBE's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that it fails to state a basis for jurisdiction, as well as under Rule 12(b)(6) on the ground that it fails to state a basis upon which relief may be granted.

CBE's complaint consists of two counts of allegations of EPCRA reporting violations on the part of Steel Company. Count I alleges that Steel Company failed to comply with § 312(a) of EPCRA, 42 U.S.C. § 11022(a), by failing to file reports detailing the firm's use of certain "hazardous" and "extremely hazardous" chemicals by March 1st of each year since 1988. Count II alleges Steel Company's failure to comply with § 313 of EPCRA, 42 U.S.C. § 11023, by virtue of its not having filed reports detailing the firm's release of certain "toxic" chemicals into the environment by July 1st of each year since 1988.

A. Past Reporting Violations

CBE claims that, by failing to complete and submit § 312(a) forms and § 313 forms by the statutory deadlines, Steel Company failed to comply with the annual reporting requirements, and has, thus, defeated the purposes of EPCRA. Pointing out that each day a firm fails to file an EPCRA report constitutes a separate violation of the Act, CBE alleges that Steel Company has amassed over 19,000 violations of § 312(a) and over 2,500 violations of § 313 since 1988.

In deciding a motion to dismiss, the Court must accept as true all facts alleged in the complaint. *Madden v. Country Life Ins. Co.*, 835 F. Supp. 1081, 1084 (N.D. Ill. 1993). Accordingly, the Court must assume as true the fact that Steel Company never filed an EPCRA report on time for seven years, and that it did, indeed, register over 20,000 violations of the Act. *Id.* That assumption, alone, however, does not end this Court's inquiry. For even though § 326(a) of the Act provides the right for citizens to enforce the reporting requirements of EPCRA, Steel Company claims that right to sue does not extend to suits for "historical" violations of the reporting requirements of §§ 312 and 313.

According to Steel Company, § 326(a) of EPCRA limits citizens' actions to those situations where a citizen seeks to force a plaintiff to come into compliance with the Act's reporting requirements. In other words, Steel Company claims that CBE cannot sue it for its failure to file timely EPCRA reports in the past, but only may sue to force Steel Company actually to complete and submit any EPCRA reports from 1988 to 1995 that it may have failed to file.

CBE disagrees with Steel Company's interpretation of § 326(a), claiming that Congress did not intend for the citizen suit provision to be read so narrowly. CBE bolsters its position by citing to several District Court cases that allowed a citizen-plaintiff to sue under EPCRA for wholly past reporting violations. See *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 751-53 (W.D.N.Y. 1991); *Williams v. Leybold Technologies, Inc.*, 784 F. Supp. 765, 768 (N.D. Cal. 1992); *Delaware Valley Toxics Coalition v. Kurz-Hastings*, 813 F. Supp. 1132, 1141 (E.D. Pa. 1993).

CBE claims that these cases show that it may, indeed, sue Steel Company for its past failures to file EPCRA reports in a timely manner.

A recent Court of Appeals case, however, seems to have cast doubt on the authority relied upon by CBE. In *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995), the Sixth Circuit Court of Appeals was faced with a suit by an environmental organization against an industrial manufacturer who was alleged to have violated EPCRA's reporting regime. Specifically, the *Musical Instruments* defendant failed to file its § 313 Form R's for the years 1988 to 1990 on time, though the defendant filed those reports after receiving the plaintiff's notice of intent to sue. *Id.* at 474. As a result, the plaintiff was left to sue the manufacturer only for late filing rather than not filing at all. *Id.*

To determine whether the statute allows suits by citizens for late filings, or as the court termed them, "historical" violations of EPCRA, the court began by examining the plain language of the statute and noted that § 326(a) allows citizens to sue only for "failure to . . . [c]omplete and submit [Form R's] under § 313 of this title." 42 U.S.C. § 11046(a)(1)(A)(iv). The court noted that, while § 313 requires the submission of the Form R's by a certain date, the citizen suit provision of § 326(a) emphasizes only the completing and submitting of the forms, making no reference to the time deadline for filings. *Id.* at 475. From this difference, the court concluded that Congress intended to distinguish between failing to file on time and not filing at all. Specifically, the court recognized that a company that files EPCRA forms after the required dates, while in violation of §§ 312 and 313, have

nonetheless "complete[d] and submit[ted]" the required forms. *Id.*

The court also contrasted the § 326 civil suit provision to the provision which authorizes the EPA to bring civil suits. As the court pointed out, the EPA is empowered to bring actions against any person "who violates any requirement" of § 313, 42 U.S.C. § 11045(c)(1), to assess and collect "any civil penalties for which a person is liable." 42 U.S.C. § 11045(c)(4). This language stands in stark contrast to the "complete and submit" language of the citizen suit provision. *Id.* The court deemed significant that difference in language because it revealed Congressional intent to limit citizens' EPCRA role to correcting ongoing violations, while the EPA has the sole authority to seek penalties for historical violations. *Id.*

The *Musical Instruments* court found support for its decision in a Supreme Court case interpreting the Clean Water Act, 33 U.S.C. §§ 1251-1387. In *Gwaltney of Smithfield v. Chesapeake Bay Found, Inc.*, 484 U.S. 49 (1987), the Supreme Court held that the Clean Water Act's citizen suit provision did not allow suits for historical violations of that Act. The Court's rationale for that decision was two-fold. First, the Court found that the Act's sixty-day notice provision would be rendered meaningless by allowing citizen suits for historical violations, because a violator would receive no benefit from the notice period if a citizen could sue anyway, even if the violator cured his noncompliance within the sixty-day period. *Id.* at 59-60. Second, the Court noted that "The bar on citizen suits when government enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant governmental action." *Id.* at 60. From this observation, the Court concluded

that allowing citizen suits for historical violations would undermine the enforcement discretion that Congress intended for the EPA. *Id.* at 60-61.

Consistent with the Sixth Circuit's decision in *Musical Instruments*, this Court concludes that § 326(a) of EPCRA does not provide the right for a citizen to sue for historical violations of the Act. The "complete and submit" language of that section, along with the purpose of the notice period and Congress' intended role for the citizen-plaintiff, leads the Court to that decision.

CBE's attempt to uncover a flaw in the *Musical Instruments* court's reasoning is also unavailing. CBE argues that, since Congress amended the Clean Water Act in 1990 to allow citizen suits for historical violations of the Act, then it must have implicitly meant that statutes with notice provisions (like the Clean Water Act and EPCRA) are, indeed, compatible with citizen suits for historical violations. But as the *Musical Instruments* court noted, it is more likely that, by amending *only* the Clean Water Act in 1990 and *not* EPCRA, Congress revealed its intent with regard to citizen suits for historical violations of EPCRA. *Musical Instruments*, 61 F.3d at 477.

Thus, to the extent that CBE claims to state a cause of action for Steel Company's late filings, or "historical violations", the Court holds that CBE has not stated a cause of action.

B. Present Noncompliance With EPCRA

Having settled the question of whether CBE may seek penalties for Steel Company's past violations of the Act, the Court must now address whether CBE has stated a

cause of action against CBE for any current failure to adhere to EPCRA reporting requirements.¹

Steel Company claims that CBE has not stated a cause of action because the Complaint fails to allege any present noncompliance with the Act. An examination of the pertinent allegations of the Complaint bears this position out. CBE alleges that "Defendant failed to submit chemical inventory forms to the SERC, the LEPC and appropriate fire department, on or before March 1, 1988, and annually thereafter through March 1, 1995." (Complaint, ¶ 22.) Similarly, CBE alleges in Count II that "Defendant failed to timely submit chemical release forms to the EPA and designated state agency on or before July 1, 1988, and annually thereafter on July 1, 1994." (Complaint, ¶ 29.) Nowhere does CBE allege that Steel Company has not "completed and submitted" EPCRA forms to the required agencies.

In addition, it is uncontested that before the Complaint was filed, Steel Company filed the proper forms with the required agencies for the relevant periods in response to CBE's notice of intent to sue.² If it were not the case it

¹ CBE claims that Steel Company's failure to file timely EPCRA reports is a present and ongoing violation of the Act. (See Plaintiff's Reply Memorandum at 10, n. 15: "Defendant can never remedy the fact that it did not file the reports on time, and will always be in violation of EPCRA for the years which it failed to file timely reports.") This argument, however, is merely another way of alleging historical violations of the Act, and this Court will treat it as such.

² The Court takes notice of the forms filed with the various agencies as they are matters of public record. *United States v. Wood*, 925 F.2d 1580, 1581 (7th Cir. 1991) (on a motion to dismiss, "[t]he district court may also take judicial notice of matters of public record.").

A26

seems likely that CBE would have included such an allegation in their complaint; no such allegation is present.³ Because the Complaint alleges only a failure to timely file the required reports, a violation of the Act for which there is no jurisdiction for a citizen suit, the Court dismisses the Complaint.

CONCLUSION

For all of the above reasons, the Court grants Steel Company's motion to dismiss.

ENTER:

/s/ George M. Marovich
George M. Marovich
United States District Judge

DATED: December 19, 1995

³ In response to the motion to dismiss, CBE attempts to effectively amend its complaint through its memoranda in opposition to the motion. CBE now apparently claims that Steel Company is not in compliance with EPCRA because the reports they submitted pursuant to EPCRA are somehow incomplete or inaccurate. To support this theory, CBE submits the affidavits of employees of various agencies which indicate that while they can certify that Steel Company has submitted the proper forms, they cannot certify whether those forms are accurate. Because there is no allegation in the Complaint that these forms are inaccurate or incomplete, these affidavits, even if properly considered here, would be irrelevant.

A27

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

CITIZENS FOR A BETTER ENVIRONMENT

v

No. 95 C 4534

THE STEEL COMPANY, a/k/a CHICAGO STEEL
AND PICKLING COMPANY

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing and the case is dismissed.

December 19, 1995
Date

H. Stuart Cunningham
Clerk

Frances D. Andrea
(By) Deputy Clerk

(4)

Supreme Court, U. S.

FILED

JAN 21 1997

CLERK

No. 96 - 643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

**THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,**
Petitioner,

VS.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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21 p/2

QUESTION PRESENTED

Whether a company that has violated the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA") for eight years may avoid a citizen suit for penalties by filing late reports, after receiving formal notice that a citizen intends to file suit, but before a complaint is filed.

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BRIEF IN OPPOSITION

Respondent Citizens for a Better Environment ("CBE") respectfully requests the Court to deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR DENYING THE PETITION

This case concerns the interpretation of a section of a statute. The Seventh Circuit used this Court's methodology for interpreting statutes and relied on the clear language of EPCRA to arrive at its decision. There is no conflict with any decision of this Court. To date, only two circuits, the Sixth and the Seventh, have ruled on the question presented. All eight district courts that have addressed the issue, including two courts which have issued decisions after the Seventh Circuit ruled, unanimously agree with the Seventh Circuit's opinion. The Sixth Circuit, the sole court disagreeing with the Seventh Circuit, stands alone, and may revisit its ruling in the future. The Court should allow the issue to percolate further among the circuits to determine if a broad and enduring circuit court split emerges.

STATEMENT OF THE CASE**A. The Emergency Planning and Community Right-to-Know Act of 1986**

The Bhopal tragedy, in which more than 200,000 people were killed or injured from the unexpected release of toxic gas, and a series of smaller incidents closer to home prompted Congress to enact the Emergency Planning and Community Right-to-Know Act of 1986, 42

U.S.C. §§ 11001 *et seq.* EPCRA focuses on citizens. Its purpose is to "provide *the public* with important information on the hazardous chemicals in their communities, and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals." H.Rep. No. 962, 99th Cong., 2d Sess. (1986). (emphasis added).

Each year, EPCRA requires industrial facilities using or storing threshold levels of specified hazardous chemicals, on dates certain, to file comprehensive reports with local, state and federal authorities reflecting the use and release into the environment of these chemicals. Timely EPCRA reporting is of the essence. See EPCRA § 312(a)(2), 42 U.S.C. § 11022(a)(2) (March 1 annual deadline for inventory reports); § 313(a), 42 U.S.C. § 11023(a). (July 31 annual deadline for release reports); *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237, 1243, n. 2 (7th Cir. 1996) (A12, n. 2) (citing Senate and House reports and statement of Rep. Sikorski).¹

EPCRA requires government authorities to make information required by EPCRA available to the public in a comprehensible form. Each day in which a company fails to report its toxic chemical use deprives citizens of their statutory right to know about the toxic chemicals to which they are, or may be, exposed. When companies fail to file reports by the statutory deadline, citizens are

¹ The Seventh Circuit's slip opinion in *Citizens for a Better Environment v. The Steel Co.* is attached to the Petition as Appendix A. Citations herein to the Seventh Circuit's decision will refer to the relevant page of the Appendix (referred to hereafter as "A").

deprived of the information that they gather under EPCRA to identify and respond to environmental concerns and to encourage industry to reduce the use of hazardous chemicals. Local authorities use information required by EPCRA to work with citizens to formulate response plans intended to limit damage resulting from the accidental release of toxic chemicals. When a report is not filed on time, the local response plans are skewed and inaccurate. Government bodies also rely on timely information submitted under EPCRA to set regulatory priorities. Industry uses the data to identify opportunities for savings by reducing the use of toxic chemicals. In fact, since 1988, releases of toxic chemicals among those companies reporting under EPCRA have decreased nearly 43 percent. A2.

Recognizing that a major purpose of EPCRA is to inform citizens in a timely manner of industrial use of toxic chemicals, and penalize those who fail to comply, Congress drafted a unique citizen suit provision in EPCRA. With one exception,² all other environmental laws, including CERCLA's citizen suit provision³ which Congress enacted as part of the same legislation as EPCRA, imply that the citizen must allege an ongoing violation by authorizing citizen suits only against persons "alleged to be in violation" of these laws. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*,

² The exception is the Clean Air Act Amendments of 1990 discussed below.

³ Congress enacted the citizen suit provision for the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" in text), 42 U.S.C. § 9659 (October 17, 1986), as the same Public Law as EPCRA, Pub. L. 99-499.

Inc., 484 U.S. 49 (1987) (interpreting the Clean Water Act).

In stark contrast to the citizen suit provision in the Clean Water Act and other environmental laws, EPCRA's citizen suit provision, 42 U.S.C. § 11046, does not contain the present tense "to be in violation" language. Instead, EPCRA's citizen suit provision authorizes citizens to file suit against persons "for failure" to submit information "under" various sections of EPCRA, including those sections requiring filing by dates certain.

Section 326 of EPCRA, 42 U.S.C. § 11046, states that, sixty days after notifying, among others, the violator, "any person may commence a civil action . . . against . . . [a]n owner or operator of a facility for failure to . . .

(iii) [c]omplete and submit an inventory form under section 11022(a) . . .

(iv) [c]omplete and submit a toxic chemical release form under section 11023(a) . . ."

Sections 11022(a) and 11023(a) require filing by dates certain. An owner or operator who has not met the statutory filing deadlines has failed to complete and submit the forms *under* §§ 11022(a) and 11023(a). In section 325(c) of EPCRA, 42 U.S.C. § 11045(c), Congress provides penalties payable to the United States of as much as \$25,000 per day against a person who violates EPCRA.

B. Factual Background

For eight years, by its own admission, The Steel Company violated EPCRA. The Steel Company is not an insignificant polluter or EPCRA violator. It released *tons* of extremely hazardous chemicals into Chicago's air, and

stored other hazardous chemicals at its Chicago facility for *eight years*, without submitting *any* § 312 or 313 reports informing citizens and the government as required by EPCRA.

As a result of The Steel Company's failure to file reports for eight years, the Chicago fire department, the Illinois Emergency Planning Commission, the United States Environmental Protection Agency, the citizens of Chicago and members of CBE have suffered and continue to suffer. For eight years, any citizen seeking to inspect The Steel Company's §§ 312 and 313 EPCRA reports would have been told, "there are none." That citizen would have assumed (wrongly) that The Steel Company was *not* using threshold quantities of toxic chemicals at its facility. The citizen would (falsely) have been led to believe that The Steel Company was *not* releasing tons of hydrochloric acid—an "extremely hazardous substance" as defined by EPA—into Chicago's air. Additionally, The Steel Company's failure to file its reports skewed Chicago's emergency response plan, which is based in part on § 312 reports. The company's violations render inaccurate the national toxic chemical release inventory, which is based on timely § 313 reports.

Only *after* CBE notified The Steel Company of its intent to file this lawsuit, did The Steel Company file its reports, as many as eight years after the statutory filing deadline. During its eight year period of non-compliance, The Steel Company's releases into Chicago's air of hydrochloric acid *increased* almost every year. By contrast, those companies who complied with EPCRA during this same time frame *decreased* their toxic releases by an average of 43 percent. A2.

C. Decision Below

The Seventh Circuit applied this Court's "interpretive methodology" to determine the statute's scope. It read EPCRA's citizen suit provision according to its "most plain and natural meaning," relying on "the language of the statute itself." *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) (A10), citing *Gwaltney*, 484 U.S. at 56 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The Seventh Circuit focused on the contrast in the language between the Clean Water Act's citizen suit provision (interpreted in *Gwaltney*) and EPCRA's citizen suit provision. In *Gwaltney*, the Court focused on "the undeviating use of the present tense" in the Clean Water Act. *Id.* at 59. By contrast, the Seventh Circuit found that "the language of EPCRA contains no temporal limitation."

The plain language of the EPCRA citizen suit provision does not clearly point to the present tense as its counterpart does in the Clean Water Act. In fact, it does just the opposite. The language of EPCRA contains no temporal limitation; "failure to do" something can indicate a failure past or present. A11.

The Seventh Circuit noted that EPCRA authorizes citizens to sue "for failure to complete and submit forms 'under' Sections 312 and 313." (emphasis added). If an owner or operator has failed to meet the statutory deadlines required under EPCRA, it has failed to submit the forms *under* EPCRA and a citizen action lies:

Congress must be assumed to have included the words "under" Sections 312 and 313 for a reason. The most natural reading of "under" a section is "in accordance with the requirements of" that section. . .

We read the provision as authorizing citizen suits not only for failure to complete and submit forms, but for failure to complete and submit forms in accordance with the requirements set forth in the referenced sections. One of these requirements is the statutory mandate that forms filed under Section 312 "shall be" submitted annually by March 1. Section 313 forms "shall be" submitted by July 1 of each year. These are not guidelines or suggestions; they are essential elements of the provisions citizens have authority to enforce. Any other interpretations "would render gratuitous the compliance dates for initial submissions which Congress placed in EPCRA's reporting provisions." *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Co.*, 772 F. Supp. 745, 750 (W.D.N.Y. 1991). A11-A12.

While the Court in *Gwaltney* concluded that the Clean Water Act employed an "undeviating use of the present tense," the Seventh Circuit found that "the enforcement provisions of EPCRA are not likewise cast in the present tense." Instead, EPCRA's citizen suit provision refers to past violations:

The absence of language limiting citizen suits to ongoing violations, and Congress' choice of language specifically referring to past violations, are strong indicators that a cause of action exists under EPCRA for violations that are not ongoing at the time a citizen suit is filed. A13.

The Seventh Circuit added that every court that looked at the citizen suit provisions prior to *Atlantic States Legal Foundation, Inc. v. United Musical Instruments*, 61 F.3d 473 (6th Cir. 1995) held that citizens are authorized to sue for failure to file reports within the statutory deadlines. *See also* "Subsequent District Court Decisions," section of this opposition, *infra*.

The Seventh Circuit addressed the Court's dicta in *Gwaltney* regarding the notice provision. In his 1987 *Gwaltney* opinion, Justice Marshall theorized that Congress would not have (1) required citizens to wait 60 days to file suit after giving notice to the violator, if (2) on the other hand Congress had intended to allow citizens to file suit for "wholly past" violations. The Seventh Circuit noted that "[t]his line of reasoning is no longer as compelling as it was when *Gwaltney* was decided [in 1987]. Since then, Congress has expressly intended that result." A13. In 1990, Congress enacted the Clean Air Act Amendments, which indeed (1) require a 60 day notice period, but (2) at the same time allow a citizen suit for past violations. *Id.*, citing The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*⁴ Since the 1987 *Gwaltney* decision, Congress has spoken: a notice period is consistent with a suit for past violations. The Seventh Circuit held that EPCRA's notice period does not preclude a suit for late filing.

The Seventh Circuit pointed out that "Congress placed great importance on the timing element of the reporting requirements." A12, n.2. It added that due to the rather minimal effort required to comply with EPCRA, virtually all companies who receive notices then file late reports before the notice period expires. To prevent citizen suits for late-filed reports, in effect, would eviscerate EPCRA's citizen suit provision, "shift[ing] the cost of EPCRA compliance from regulated industrial users to private citizens. . . This scenario is impossible to reconcile with the

⁴ The Clean Air Act citizen suit provision is codified at 42 U.S.C. § 7604.

clearly expressed intent of Congress, or with the very existence of the citizen enforcement provision." A15.

D. The Position of the United States

The United States filed an *amicus* brief and presented oral argument before the Seventh Circuit in support of CBE's right to proceed. The United States reviewed the language of EPCRA's citizen suit provision and §§ 312 and 313 of EPCRA and concluded that these sections "authorize a citizen suit whenever an owner or operator has failed to complete and submit the required forms by the statutory deadlines." Br. at 6. The United States reviewed the Clean Water Act's ("CWA") citizen suit provision interpreted in *Gwaltney* and contrasted it with EPCRA's citizen suit provision:

EPCRA's citizen suit provision is fundamentally different—in text, history, and purpose—from that of the CWA and several environmental statutes. Thus, despite the district court's reliance, *Gwaltney* is inapposite.

Br. at 10. The United States emphasized that citizen suits increase EPCRA compliance and aid EPA enforcement:

[T]he district court's holding eviscerates the deterrent effect of citizen enforcement. Unless reversed, this holding will undermine EPCRA compliance, place additional burdens on EPA's enforcement resources, and diminish the reliability of critical information generated by the statutory reporting requirements.

Br. at 3. The United States "urge[d] the Court to reverse," which it did, holding that citizens may sue for failure to file timely reports. *Id.* at 20.

E. Subsequent District Court Decisions

Since the Seventh Circuit's ruling and the filing of the Petition, two additional district courts have agreed with the Seventh Circuit and specifically rejected the Sixth Circuit's *United Musical Instruments* decision. *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, Civ-95-1808-PHX-ROS (D. Az. December 17, 1996) 1996 U.S. Dist. LEXIS 19068, *13 ("Analysis of the plain language of the statute and the policies driving the enactment of the EPCRA compels the conclusion that the *Citizens* [Seventh Circuit] court has embraced the better reasoned approach to statutory construction."); *Idaho Sporting Congress v. Computrol, Inc.*, No. 96-0027-S-BLW (D. Id. December 17, 1996), 1996 U.S. Dist. LEXIS 19642, *8 ("The Court therefore chooses to follow *Steel Co.*, not *UMI*, in holding that EPCRA does permit citizen suits alleging only historical violations of the statute."). There are now nine decisions agreeing with the Seventh Circuit and one decision—*United Musical Instruments (UMI)*—going the other way.

ARGUMENT

A. The Seventh Circuit's Ruling is Correct

The Seventh Circuit's decision is correct. Petitioner and the *amicus* parties ignore the controlling language in EPCRA's citizen suit provision. They focus on subsidiary issues, none of which are relevant in view of the unambiguous language of the statute. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 847, 842-43 (1984); *Caminetti v. United States*, 242 U.S. 470, 485 (1916) (Where the language of a statute is plain and

unambiguous on its face, "the sole function of the courts is to enforce it according to its terms."). There is no reason for the Court to consider a well-reasoned decision by the Seventh Circuit.

B. There Are No Conflicts With This Court

The Seventh Circuit applied the very methodology used to interpret statutes by the Court in *Gwaltney* and numerous other cases—it focused on "the language of the statute itself." *Gwaltney* at 56. The Seventh Circuit pointed out how EPCRA's citizen suit provision language differs from the language of the Clean Water Act interpreted in *Gwaltney*. The mere fact that EPCRA, interpreted by the Seventh Circuit, affords citizens different rights than the Clean Water Act, interpreted by the Court, does not present any conflicts.

Nor are there any Constitutional issues before the Court, let alone any conflicts with the Court's interpretation of the Constitution. This case presents an issue of statutory interpretation and no more. The Steel Company's reference to "standing" is an undeveloped afterthought with no basis. Not only did The Steel Company fail to argue standing at the trial court level, but its petition fails to explain why CBE has no standing. Its argument appears to be a facial challenge to the language of EPCRA's citizen suit provision with no indication how the statute's language conflicts with any opinion of the Court. In any event, courts are clear that persons experiencing a loss of information under EPCRA and who seek penalties for late-filing have suffered an injury conferring standing. *Atlantic States Legal Foundation, Inc. v. Buffalo Envelope Co.*, 823 F. Supp. 1065,

1071 (W.D.N.Y. 1993); *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, Civ-95-1808-PHX-ROS (D. Az. December 17, 1996) 1996 U.S. Dist. LEXIS 19068; *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1138-42 (E.D. Pa. 1993).

C. The Issue Should Percolate Among the Lower Courts

The issue before the Court is not one in which lower courts are hopelessly divided. Of the *ten* decisions that have addressed citizen's authority to file suit for failure to meet the statutory deadlines, only *one* court has denied citizens that right—the Sixth Circuit in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments*, 61 F.3d 473 (6th Cir. 1995). *United Musical Instruments* stands alone. It was incorrectly decided. The Sixth Circuit dismisses the controlling language of EPCRA's citizen suit provision and its variation from other environmental statutes as "hypertechnical parsing of the language". *Id.* at 477. The Sixth Circuit's analysis ignores this Court's mandate in *Gwaltney* and other cases "to read a statute according to its most plain and natural meaning." A10. The mere fact that the Sixth Circuit issued an incorrect decision does not mean that the Court should review a separate case that arrived at the correct decision.

Moreover, the Court should allow other courts to express their views to determine if a significant conflict between circuits exists. As only two circuits and six district courts (eight district court decisions) have interpreted EPCRA's citizen suit provision, denial of the petition will allow additional lower courts to consider the

issue. If the Sixth Circuit recognizes that its decision continues to stand alone, it can reexamine its ruling. *Amicus* Pacific Legal Foundation's claim (at 6) that it is unfair to allow EPCRA citizen suits in one jurisdiction and not another is no reason to grant the petition. *Amicus* can avoid "disparate treatment" by complying with the law.

D. Petitioner Misconstrues the Seventh Circuit's Holding and Its Implications

The Seventh Circuit explained that to eliminate suits for late-filing "is impossible to reconcile with the clearly expressed intent of Congress, or with the very existence of the citizen enforcement provision." A8. Congress made it clear that timely EPCRA filing is of the essence. The Sixth Circuit's decision would, in effect, eviscerate EPCRA's citizen suit provision. Rather than addressing the implications of the Sixth Circuit's decision, Petitioner and *amicus* misconstrue the impact of the Seventh Circuit's decision.

Petitioner overstates the Seventh Circuit's holding in asserting that citizens will now "exhume" violations when parties have filed forms late *without* the prompting of citizen action. This is not the holding of the Seventh Circuit. The issue before the Seventh Circuit was "whether citizens may seek penalties against EPCRA violators who file after the statutory deadline, *after receiving notice of intent to sue*, but before a complaint may be filed in the district court." A9. (emphasis added). If, as Petitioner claims, a citizen discovers late-filed reports two years after they were submitted, the reports would have been filed *before*, not "after receiving notice of

intent to sue." *Id.* Here, by contrast, when The Steel Company received CBE's notice of intent to sue, for eight years it had failed to file any reports required by §§ 312 and 313 of EPCRA.

Petitioner and *amicus* refer to the burdens and penalties imposed by EPCRA.⁵ This is a matter to address with Congress.⁶ In any event, the penalties are not "potentially ruinous." The Seventh Circuit made it clear that ability to pay is always a factor in assessing the penalty. A7. Petitioner and *amicus* Mid-America Legal Foundation criticize citizens who identify their EPCRA violations. EPCRA does not unduly reward citizens. It does authorize courts to award citizens their costs incurred as the prevailing party. If companies want to avoid these costs, they, rather than citizens, can monitor their own chemical use and comply with EPCRA. Compa-

⁵ Petitioner has no basis for its claim (at 12-13) that "EPCRA's effect on the environment is far less direct than [other statutes]." As the Seventh Circuit points out, those companies (unlike Petitioner) who have complied with EPCRA, have reduced their releases of toxic chemicals into the environment by an average of 43 percent since 1988.

⁶ Petitioner and *amicus* Mid-America Legal Foundation cite a 1994 Illinois statute that allows companies to avoid Illinois EPA prosecution in state court if the companies file reports within a 30 day "grace period" after Illinois EPA notifies them of their failure to file. This is irrelevant as it relates to a state law, not EPCRA. In a serious omission, Petitioner and *amicus* have failed to inform the Court that the Illinois legislature has enacted a *citizen* suit provision that parallels EPCRA's citizen suit provision. After giving 60 days notice, the citizen suit provision authorizes citizens to file suit under the Illinois EPCRA. The Illinois EPCRA citizen suit statute does not include any "grace period" whatsoever. 430 Illinois Compiled Statutes 100/17.

nies who are caught violating EPCRA by citizens have no equitable argument that they are entitled to avoid penalties.

Petitioner is incorrect in asserting (at 26) that the decision "flings open the doors of federal courthouses to those actions." Since the first decision addressing the issue in 1991, every court other than the Sixth Circuit's 1995 *United Musical Instruments* ruling has authorized suits for failure to meet the statutory deadlines. The majority (and until 1995, unanimous) view has authorized EPCRA citizen suits for past violations. Yet there are very few cases in which courts have issued an opinion relating to EPCRA citizen suits. If a decision authorizing suits for failure to meet statutory deadlines would fling open the doors of courthouses, this would have already happened. It has not.

The parties supporting review are also incorrect in asserting that citizen suits for late-filing interfere with government enforcement discretion. The Seventh Circuit decision does not give citizens the same enforcement authority as the United States. Among other things, the United States can always preempt a citizen lawsuit by diligently pursuing an administrative or judicial action, 42 U.S.C. § 11046(e), and unlike citizens can pursue an administrative action. 42 U.S.C. § 11045. Under the ruling of the Seventh Circuit, citizens still supplement, rather than supplant, government enforcement. Finally, the United States—the most qualified party to speak about any interference with its own enforcement discretion—strongly encourages citizen suits under EPCRA for failure to file reports in a timely manner. If the United States felt any threat that citizens were, or might in the

future, interfere with its enforcement discretion, it would not support CBE's position.⁷

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

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⁷ To the extent that it was ever a concern, Congress rejected the notion that citizen suits for historical violations would undermine the enforcement discretion of the United States in 1990 when it amended the Clean Air Act and gave citizens the right to sue for past violations.

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Supreme Court, U. S.

F I L E D

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No. 96-643

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

**THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,**
Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

**REPLY BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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I. RESPONDENT HAS NO STANDING TO BRING THIS ACTION

Concerned that this Court might grant the Petition and examine the Seventh Circuit's decision on the basis that Respondent lacks standing, Respondent attempts to touch as lightly as possible on the Article III issue. Respondent blithely (and unconvincingly) suggests that this case is simply one of statutory construction, raising no constitutional issues, and that, consequently, the Seventh Circuit's decision could not conflict with this Court's interpretation of Article III. Resp. Br. at 11. Of course that is wrong, and Respondent thus makes no attempt to discuss this Court's holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), its effect on the standing of citizen plaintiffs seeking to sue for past EPCRA violations, or any of this Court's standing cases.

Instead, Respondent cites, without discussion, three district court cases for the proposition that late-filed EPCRA reports confer standing on EPCRA citizen plaintiffs. Resp. Br. at 11-12.¹ These district courts erroneously found that a citizen plaintiff had standing to sue for wholly past EPCRA violations on the notion that: 1) persons who are deprived of information because of

¹ Respondent is also mistaken that Petitioner "fail[ed] to argue standing at the trial court level. . . ." Resp. Br. at 11. The Steel Company has raised the issues of standing and mootness at every step of this case. Steel Company's Memorandum in Support of Motion to Dismiss at 8, *Citizens for a Better Environment v. The Steel Co.*, 42 Env't Rep. Cas. (BNA) 1186 (N.D. Ill. 1995); Steel Company's Appellee Brief at 33, *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237 (1996). Even if Respondent were correct, standing is a necessary element of federal court jurisdiction and can be attacked for the first time on appeal. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-47 (1986).

late-filed reports suffer an injury in fact; and 2) the injury is redressable by a court's imposing penalties for the late reports, enjoining future EPCRA violations (even though the defendant had long come into compliance), or awarding costs of litigation.

Respondent cannot show an injury, but even if it could, Respondent certainly cannot demonstrate redressability. None of the factors cited by the three district courts—that a court may enjoin a party from committing future EPCRA violations, assess penalties payable to the U.S. Treasury, or award attorneys' fees and costs—satisfies the redressability prong of the standing test.

That a court may impose penalties payable to the U.S. Treasury or enjoin future violations does not give an EPCRA citizen plaintiff a sufficient stake in a case for Article III purposes. By seeking penalties or relief enjoining future violations, Respondent is not acting on its own behalf, but is instead acting on behalf of the government and the public at large. *Cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) (private parties have no judicially cognizable interest in the prosecution of another); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (same). Because it is undisputed that The Steel Company was in compliance before this suit was filed, Respondent's only interest in this case is that The Steel Company be called upon to answer for any past violations by paying penalties. Such an interest does not go beyond the "undifferentiated public interest" in the "faithful execution" of our country's laws and is insufficient to confer standing on the citizen plaintiff. *See Lujan*, 504 U.S. at 577; *see also Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 70 (Scalia, J., concurring) ("If it is undisputed that the defendant was in a state of compliance when this suit

was filed, the plaintiffs would have been suffering no remediable injury in fact that could support suit.") Just as the possibility of penalties or future injunctive relief does not confer standing, this Court has likewise held that a possible award of attorney's fees does not constitute a sufficient interest in a case for Article III purposes. *Lewis Continental Bank v. Lewis*, 494 U.S. 472, 480 (1990); *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986).

That *Lujan* involved a government defendant does not matter for Article III purposes. Under *Lujan*, a citizen does not have standing to proceed against a private defendant "unless he can show some kind of personal stake. After *Lujan*, the citizen-suit provisions are probably unconstitutional even when the defendant is a private citizen or corporation." Cass R. Sunstein, *What's Standing After Lujan?, of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 231-32 (1992).

Not only does Petitioner maintain that Respondent has no standing, but the United States agrees with Petitioner that a past violation cannot confer standing on an environmental citizen suit plaintiff:

A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability. However, a citizen who brings suit simply to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to meet Article III's requirements; the mere assessment of civil penalties, which are payable only to the Treasury, would not redress in any meaningful sense the citizen's alleged injuries. Indeed, if Congress were to

give private citizens untrammelled authority to seek penalties for wholly past violations—oblivious to Article III's requirement that a litigant have a personal stake in the controversy—it would intrude upon the Executive's responsibility to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, § 3) and the prosecutorial discretion inherent therein.²

Because Respondent has no standing to bring this action, a position also supported by the United States, the Court should grant the Petition and reverse the decision below.

II. THERE ARE NO ISSUES TO DISTILL OR REFINE

Respondent also urges denial of the Petition so that the issue can percolate among the lower courts. Resp. Br. at 12-13. Respondent fails to explain, however, what is to be gained by additional percolation of this purely legal issue. There are no issues to distill or refine; there are no complex, analytical approaches to the question presented that might benefit from additional discussion and testing in the lower courts. This case does not present a situation where "further consideration of the substantive and procedural ramifications of the problem by other courts will enable [the Court] to deal with the issue more wisely

² Brief of the United States as Amicus Curiae Supporting Affirmance at n. 34, *Gwaltney*, 484 U.S. 49 (1987) (citation omitted) (available in LEXIS, Genfed Library, USPlus File). The United States urged affirmance arguing that respondents had properly alleged that Gwaltney was in violation of its discharge permit, but rightly noted that there is no standing if the violation is wholly past. In this case, the United States submitted an amicus brief and argued to the Seventh Circuit that EPCRA citizen suits would not interfere with EPA's enforcement discretion, but the United States did not address the threshold issue of whether Respondent has standing to bring this action.

at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983). A fully percolated conflict has been reached: the Sixth and Seventh Circuit Courts of Appeals have taken opposite positions, and the Seventh Circuit's decision below conflicts with this Court's holdings in *Lujan* and *Gwaltney*.³

These circumstances merit review by this Court. Continued percolation will lead only to continued litigation. The courts, industry, and citizen groups will benefit from the Court's ruling on this issue resolving the conflict between the circuits.

III. RESPONDENT MISAPPREHENDS THE IMPACT OF THE SEVENTH CIRCUIT'S OPINION AND OVERSTATES EPCRA'S EFFECT

In stating that the Seventh Circuit did not hold that citizen plaintiffs may now target years' old EPCRA violations, Resp. Br. at 13-14, Respondent misinterprets the effect of the decision below and also retreats from its main argument: that a party who fails to file EPCRA reports by March 1 and July 1 each year has violated EPCRA and is therefore subject to citizen enforcement. Opening Brief of Appellant at 17, *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237 (7th Cir.

³ Respondent states that this Court's discussion of the purpose of the 60-day notice period is "dicta." Resp. Br. at 8. Far from being mere commentary on a side issue, this Court's finding that "the purpose of notice to the alleged violator is to give it an opportunity to come into compliance with the Act and thus likewise render unnecessary a citizen suit," *Gwaltney*, 484 U.S. at 60, was one of its main bases for holding that Congress did not intend to allow citizen suits for past Clean Water Act violations. The Seventh Circuit's opinion also conflicts with *Gwaltney* on several other points. Petition at 9-16, 19-22.

1996) (Because The Steel Company had not submitted reports before the specified dates, "[t]he language of the statute authorizes Citizens for a Better Environment to pursue this action for untimely reports.") Nothing in the Seventh Circuit's opinion bars citizen groups from searching government records to find old EPCRA violations on which to base citizen suits, something Congress certainly could not have intended when it enacted EPCRA. Petition at 26-27. Moreover, interest groups, many of which have aggressively pursued EPCRA cases, now armed with the Seventh Circuit's opinion, may well become emboldened to actively seek out past violations, not to secure compliance (compliance having long been achieved), but only to obtain penalties and attorneys' fees. Congress could not have intended such a use of EPCRA's citizen suit authority.

Finally, Respondent takes issue with The Steel Company's assertion that EPCRA is different from other environmental statutes because it is solely a reporting statute. Respondent states that parties reporting under EPCRA have reduced their releases by 43 percent since 1988 and appears to imply that EPCRA is the driving force behind the reduction. Resp. Br. at 14 n. 5. Respondent does not attempt to explain the nexus between EPCRA's requirements and reduced emissions, however, and fails to note that EPCRA does nothing to restrict a facility's emissions (its permits required under other environmental laws do that) nor does EPCRA provide incentives to reduce emissions. Because businesses must earn a profit to survive, financial reasons are the likely incentive behind the noted reductions. See Bradford Mank, *Preventing Bhopal: "Dead Zones" and Toxic Death Risk Index Taxes*, 53 Ohio St. L.J. 761, 769-70 (1992) (While voluntary reductions in releases are laudable,

firms are more likely to reduce their use of hazardous chemicals or substitute less harmful ones if it is economically advantageous.)⁴ It does not make sense that Congress did not intend to allow citizen suits for past violations involving actual contamination, *Gwaltney*, 484 U.S. 49, but did intend to allow citizen suits for past reporting violations.

CONCLUSION

Wherefore, for the foregoing reasons, this Court should grant the Petition and reverse the decision below.

Respectfully submitted,

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⁴ By stating that The Steel Company "is not an insignificant polluter," Resp. Br. at 4, Respondent also appears to suggest that The Steel Company is either operating without a permit or violating its permitted levels. Such is not the case. Respondent is indulging in the (perhaps common) misconception that because a company lists releases to the environment in its EPCRA reports, uncontrolled releases must be taking place, when in reality the company is responsibly managing its operations and waste materials. Even Respondent's members, who certainly drive cars, ride in buses, trains and airplanes, generate household waste, and generally avail themselves of the benefits of an industrial and consumer society, must admit that they are also "polluters."

No. 96-643

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE
OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONER

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1998

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for writ of certiorari. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation affecting the public interest. PLF was founded in 1973, has over 20,000 members, contributors, and supporters throughout the country, and maintains its principal office in Sacramento, California. PLF policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only when PLF's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving the interpretation of federal environmental laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in *Bennett v. Spears*, Supreme Court No. 95-813; *Douglas County, Oregon v. Babbitt*, Supreme Court No. 95-371; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, __ U.S. __, 115 S. Ct. 2407 (1995); and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).

The Seventh Circuit ruling in this case, authorizing citizen enforcement of wholly past reporting violations under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11001, *et seq.*, expressly

contradicts a Sixth Circuit ruling on indistinguishable facts. This ruling also conflicts with the reasoning of this Court's unanimous decision in *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987).

At issue in this case is not only the plain meaning of the citizen suit provision of EPCRA, but also the policy interests behind such provisions. Whereas the Sixth Circuit adopted this Court's reasoning in *Gwaltney*, that citizen suits (with forward-looking preenforcement notice requirements) are authorized to support, but not supplant, government enforcement of environmental laws, the Seventh Circuit reasoned the main purpose of such citizen suits is to reward citizen enforcers.

The Seventh Circuit ruling in this case creates unnecessary confusion in the important area of citizen enforcement of environmental laws. Review by this Court is necessary, therefore, to avoid confusion and promote the intent of Congress as expressed in the Emergency Planning and Community Right-to-Know Act.

PLF's public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The question presented in this case is whether Congress intended to authorize citizens, under the Emergency Planning and Community Right-to-Know Act, to seek penalties for violations that were cured before the citizen suit was filed. The facts which give rise to this question follow.

The Steel Company (Company) is a small, minority-owned steel manufacturer and pickler in Chicago, Illinois. The Company started in 1971 and employs about 55 people. The Company is subject to EPCRA which requires, among other things, the annual submission of chemical inventory and release forms to federal, state, and local entities pursuant to Sections 312 and 313. On March 16, 1995, Citizens for a Better Environment (CBE), an environmental citizen group, sent an EPCRA 60-day notice of intent to sue to the United States Environmental Protection Agency (EPA), the state, and the Company alleging the Company had never filed the requisite forms. Before the 60-day notice period had run, the Company filed the forms with the EPA. EPA chose not to pursue any enforcement action but, notwithstanding the filing, CBE filed suit in the Northern District Court of Illinois seeking, among other things, civil penalties against the Company.

A few days before CBE filed suit, the Sixth Circuit held, on facts indistinguishable from this case, that citizens could not sue for past EPCRA violations. *Atlantic States Legal Foundation v. United Musical, Inc.*, 61 F.3d 473 (6th Cir. 1995). The Company filed a motion to dismiss based on the Sixth Circuit's opinion, which was granted. CBE appealed, and on July 23, 1996, the Seventh Circuit reversed.

Although the Seventh Circuit noted the District Court's reliance on *United Musical* was not misplaced, and that *United Musical* relied on *Gwaltney*, the Court nevertheless rejected the Sixth Circuit holding. In *Gwaltney*, this Court considered the 60-day notice provision for citizen suits under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and unanimously held the purpose of the provision is to allow the alleged violator to come into compliance, thus making a citizen suit unnecessary. According to this Court, the power to sue for penalties based on past violations rested solely with the government. In this case, however, the Seventh Circuit reasoned it is more important to reward citizen groups for their enforcement efforts.

SUMMARY OF ARGUMENT

The Seventh Circuit ruled citizens may sue for wholly past violations of EPCRA. This ruling conflicts with a Sixth Circuit decision on essentially the same facts. This conflict is not inferred but openly acknowledged by the Seventh Circuit. That court flatly disagreed with the Sixth Circuit's more narrow reading of the citizen suit provision of EPCRA that citizen suits are limited to prospective relief. The Seventh Circuit decision is not supported by the plain meaning of the Act, the legislative history, or the policy objectives of such citizen suits. In consequence of this conflict, regulated entities are subject to inconsistent enforcement of the law and potentially immense citizen suit liability in one jurisdiction and not in another.

The Seventh Circuit ruling is also contrary to the unanimous opinion of this Court in *Gwaltney* in which this Court held that if citizen suits may target purely historical violations, the requirement of notice to the alleged violator becomes gratuitous. The citizen suit is meant to supplement rather than supplant discretionary government action. The Seventh Circuit rejects this reasoning outright and holds EPCRA must be interpreted to award citizens for their enforcement efforts. This interpretation is untenable and cannot be reconciled with a plain reading of the Act.

To ensure even-handed application of the law, to rectify the confusion this case creates over the scope of citizen suits under EPCRA, and to clarify the policy objectives of such citizen suit provisions, this Court should grant the writ of certiorari.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS ON THE SCOPE OF THE CITIZEN SUIT PROVISION OF EPCRA

There can be no doubt that a real conflict exists between the Sixth and Seventh Circuits as to the scope of the citizen suit provision of EPCRA. The Seventh Circuit expressly stated, "we disagree with the Sixth Circuit's interpretation of the citizen enforcement provisions of EPCRA in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A.*" *Citizens for a Better Environment v. The Steel Company*, 90 F.3d 1237, 1242 n.1 (1996) (*Citizens*). In *United Musical*, the Sixth Circuit held, "the plain language and structure of EPCRA lead us to conclude that citizen plaintiffs may not bring actions that seek civil penalties for purely historic violations." *United Musical*, 61 F.3d at 478. This conflict is untenable and should be resolved.

Under Sections 312 and 313 of EPCRA, civil penalties can amount to \$25,000 per violation. Each day is a separate violation. *Citizens*, 90 F.3d at 1241. Nevertheless, as the Seventh Circuit observed in this case, "[m]any industrial companies subject to the Act remained unaware of its existence long after it went into effect" in 1986. *Id.* at 1238. The EPA estimated that of the approximately 30,000 facilities required to submit Section 313 forms, over one-third had not. General Accounting Office, EPA's Toxic Release Inventory Is Useful But Can Be Improved, at 49 GAO/RCED 91-121 (June, 1991). Additionally, according to an EPA report sent to the Office of Management and Budget, specified annual reporting requirements under

EPCRA Sections 311 and 312 potentially affect 866,285 facilities. 60 Fed. Reg. 35201. For those facilities that are still unaware of EPCRA, the potential liability is immense. Indeed, CBE alleges the Company in this case was out of compliance for approximately eight years. The Company's potential liability under a retroactive citizen suit in the Seventh Circuit is, therefore, close to \$73,000,000, whereas in the Sixth Circuit the Company would have no citizen suit liability (although in either jurisdiction the federal government may pursue its own enforcement actions for historical violations).

This level of disparate treatment under the law has significant ramifications for the economic competitiveness of companies and is based solely on the federal circuit in which they happen to be located. This Court should review the Seventh Circuit decision in light of *United Musical* and provide a consistent interpretation of EPCRA. To that end, an analysis of the Circuits' conflicting viewpoints is instructive.

A. On Facts Indistinguishable from This Case, the Sixth Circuit Held Citizens May Not Sue for Wholly Past Violations of EPCRA

In *United Musical*, the Atlantic States Legal Foundation sent United Musical Instruments a notice of intent to sue for that company's failure to submit the chemical release reporting forms required by Section 313 of EPCRA. Within the 60-day notice period, the company submitted the forms, and the foundation sued the company in federal District Court for the past violation. (The Seventh Circuit held these facts are indistinguishable from the present case. *Citizens*, 90 F.3d at 1242.) The District Court dismissed the case as time-barred. On appeal, the Sixth Circuit upheld the dismissal because EPCRA does not allow citizen suits for past

violations that have been cured by the date the action commences. *United Musical*, 61 F.3d at 475.

To reach this conclusion, the court looked first at the language of the statute and found Congress could have phrased its requirements in language that looked to the past but it did not choose this readily available option. *Id.* at 477. Rather, the court determined the most natural reading of the citizen suit provision of EPCRA weighs against allowing citizen suits for purely historical violations. *Id.* The court then looked at the legislative history of EPCRA and determined there is nothing indicating Congress intended to allow citizens to sue for past violations. *Id.*

Another decisive factor in the court's determination was this Court's discussion in the *Gwaltney* opinion concerning the role of citizen suits in the Clean Water Act. The court noted that EPCRA, like the Clean Water Act, prohibits citizen suits once EPA has commenced an enforcement action. In *Gwaltney*, this Court stated the bar on citizen suits when government enforcement action is under way suggests citizens suits are meant to supplement rather than supplant governmental action. *Gwaltney*, 484 U.S. at 60. In further reliance on *Gwaltney*, the Sixth Circuit pointed out this Court's expressed concern about the potential of citizen suits to inhibit the ability of government officials to exercise discretion in using their enforcement powers. This Court stated the EPA might, for example, deem it in the public interest to forego civil penalties in a particular case for some concession from the violator and that allowing citizen suits years later for the same violation would curtail considerably such discretion and change the citizen's role from interstitial to potentially intrusive. *Id.* at 61. This Court concluded that Congress could not have intended such a result. *Id.*

Contrary to the Sixth Circuit's ruling in *United Musical*, that EPCRA does not allow citizen suits for past violations,

the Seventh Circuit in this case considered the same citizen suit provision of EPCRA and came to the opposite conclusion.

B. The Seventh Circuit Decision Contradicts the Sixth Circuit Decision in Every Particular

The Seventh Circuit in this case also looked first to the language of the statute. But, contrary to the Sixth Circuit finding in *United Musical*, the Seventh Circuit found the citizen suit provision of EPCRA does look to the past. However, where the Sixth Circuit required explicit congressional language allowing citizen suits for historical violations, the Seventh Circuit was satisfied with something much less.

For example, the Seventh Circuit noted EPCRA authorizes citizens to sue "for failure to" comply with the statute. The court then maintained this ambiguous reference "can indicate a failure past or present." *Citizens*, 90 F.3d at 1243. The Seventh Circuit also noted that for citizen suits notice of intent to sue must be given to the EPA, the alleged violator, and "the State in which the alleged violation occurs." *Id.* at 1244. Although the term "occurs" in the notice provision clearly connotes something ongoing, the Seventh Circuit unabashedly maintained, "[n]owhere does EPCRA contain the 'is occurring' language of the CWA [Clean Water Act] to indicate that citizens must allege an ongoing violation." *Id.*

Aside from its strained reading of the statutory language, the Seventh Circuit cites nothing in the legislative history to justify its conclusion that EPCRA authorizes citizen suits for past violations. Rather, the court infers Congress intended to allow such suits when it amended the Clean Air Act. 42 U.S.C. § 7401, *et seq.* In 1990, Congress amended the Clean Air Act to allow citizen enforcement actions for

historical violations, but left the notice provision intact. According to the Seventh Circuit, the rationale behind *Gwaltney*, that the existence of a 60-day notice provision allows violators to come into compliance and that allowing citizens to sue after violations ceased would defeat the purpose of the notice provision and undercut the EPA's enforcement discretion, becomes less compelling when considered in light of this amendment to the Clean Air Act. *Id.* But the Sixth Circuit had a response to that argument.

In *United Musical*, the court acknowledged this argument has a certain logic but determined it is unpersuasive since one can argue with equal force that by amending the Clean Air Act, but not amending EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time the suit is filed. *United Musical*, 61 F.3d at 477. In fact, the Sixth Circuit concluded in the absence of explicit congressional language mandating such a result—as in the amended Clean Air Act—the court must reject the argument. *Id.*

Finally, the Seventh Circuit considered the purpose of the citizen suit provision and concluded the provision must be interpreted to reward citizens for their enforcement efforts. *Citizens*, 90 F.3d at 1244. According to the court, allowing citizen suits for past violations would advance this purpose. *Id.* However, this view runs counter to that adopted by the Sixth Circuit in *United Musical* and this Court in *Gwaltney* that citizen suit provisions, like the provision in this case, are intended to only supplement, but not replace, the enforcement efforts of the government.

The scope of citizen suit actions in our environmental statutes is an important question of law. The split in the Circuits occasioned by the Seventh Circuit decision in this case is the very type of conflict that demands resolution by this Court. It causes confusion and results in contradictory

enforcement of the law. Commercial businesses operate in numerous jurisdictions and are subject to a myriad of complex, often onerous, regulatory programs that hinder or stymie economic production. These entities should not be subject to uncertain or inconsistent application of federal law. For these reasons, this Court should grant the writ of certiorari.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND THIS COURT'S OPINION IN *GWALTNEY*

In *Gwaltney*, this Court had to consider whether the Clean Water Act (CWA) conferred jurisdiction over citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction citing, among other things, the forward-looking language, and the purpose of the citizen suit provision.

This Court stated one of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense. *Gwaltney*, 484 U.S. at 59. By way of example, this Court cited the notice provision of the Clean Water Act that citizen-plaintiffs must give notice to the alleged violator, the administrator of the EPA, and the state in which the violation "occurs." *Id.* at 59. This interpretation of the word "occurs" as present tense stands in stark contrast to the interpretation given this same word in the notice provision of EPCRA by the Seventh Circuit. Contrary to a plain reading of the statute, the Seventh Circuit held the enforcement provisions of EPCRA, including the word "occurs," are not likewise cast in the present tense. *Citizens*, 90 F.3d at 1244.

Perhaps a more telling indication of the conflict between the Seventh Circuit opinion in this case and this Court's opinion in *Gwaltney*, than the hypertechnical parsing of the language of the statute, is the Seventh Circuit's flat rejection of this Court's policy rationale for disallowing CWA citizen suit actions for wholly past violations.

In *Gwaltney*, this Court reasoned retroactive citizen suits would render incomprehensible the CWA notice provision that requires citizens to give 60-day's notice of their intent to sue to the alleged violator as well as to the administrator of the EPA and the state. *Gwaltney*, 484 U.S. at 59. "If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary." *Id.* According to this Court, it follows logically that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a citizen suit." *Id.* at 60. In a unanimous opinion, this Court stated: "If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." *Id.*

But this Court did not stop there. Rather, it noted a contrary view would create a second and even more disturbing anomaly. This Court pointed out that the bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant government action. *Id.* "Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit." *Id.* To illustrate this danger, this Court posed a hypothetical.

Suppose the administrator of the EPA identified a violator and issued a compliance order. *Id.* "Suppose

further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 61. "If citizens could file suit, months or years later, in order to seek the civil penalties the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* "The same might be said of the discretion of state enforcement authorities." *Id.* This Court concluded an interpretation of the scope of the citizen suit provision of the Act, allowing citizen suits for past violations, would change the nature of the citizen's role from interstitial to potentially intrusive. *Id.* "We cannot agree that Congress intended such a result." *Id.*

Clearly, Congress did not intend such a result under the Clean Water Act or the Emergency Planning and Community Right-to-Know Act. This Court's policy rationale for limiting the scope of the citizen suit provision of the CWA applies equally to EPCRA: EPCRA contains a prohibition on citizen suits when the government acts; the notice provision of EPCRA contains forward-looking language; and the legislative history does not suggest a contrary congressional intent. Nevertheless, the Seventh Circuit flatly rejected this Court's reasoning in *Gwaltney*.

The sole basis for the court's rejection of this Court's policy considerations was an amendment to an act other than EPCRA. The Seventh Circuit held the reasoning of this Court is no longer as compelling as it was when *Gwaltney* was decided because, since then, Congress amended the Clean Air Act, to permit citizen enforcement actions for past violations, yet left the notice provision intact. *Citizens*, 90 F.3d at 1244. The Seventh Circuit apparently believes that when Congress amended the Clean Air Act to explicitly allow citizen suits for past violations any statute with a

similar notice provision, like EPCRA, had been implicitly altered as well. Other environmental statutes which contain similar notice provisions, and which this Court has concluded authorize only prospective relief, include the Clean Water Act, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.* *Gwaltney*, 484 U.S. at 57. Have these acts also been changed by amendment of the Clean Air Act? The position of the Seventh Circuit is unreasonable. All the amendment of the Clean Air Act shows is that Congress knows how explicitly to authorize citizen suits for wholly past violations, in particular situations, when it intends to do so. *See id.* Congress never explicitly authorized such citizen suits in EPCRA.

In place of, and totally contrary to, the policy rationale applied by this Court in *Gwaltney*, the Seventh Circuit suggested a rationale that seeks foremost to reward citizen enforcers. The Seventh Circuit held EPCRA creates a structure that encourages private citizens to invest the resources necessary to uncover violations of the Act by allowing courts to award the costs of enforcement to substantially prevailing parties. *Citizens*, 90 F.3d at 1244. If citizen suits could be fully prevented, the court argues, by completing and submitting forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. *Id.* Put simply, the court stated, if citizens can't sue, they can't recover the costs of their efforts. *Id.* "Private enforcement of the reporting requirements would undoubtedly drop off." *Id.* at 1245.

What the Seventh Circuit overlooks, however, is that EPCRA, like the CWA, contains a provision that bars citizen suits when the government chooses to enforce the Act. 42 U.S.C. § 11046(e). If the government exercises its enforcement discretion, citizens cannot bring a suit and

recover their costs anyway. Therefore, limiting citizen suits to prospective relief leaves citizens no worse off than if the government chooses to act, and the government has discretion to act in all cases. To achieve, in all cases, the ends suggested by the Seventh Circuit—to reward citizens for their enforcement efforts—EPCRA would have to be read to authorize a citizen suit every time a citizen sends a notice of intent to sue, even if the government pursues a discretionary enforcement action. Clearly, Congress did not intend such a result.

The Seventh Circuit laments that if citizen suits are not allowed for wholly past violations under EPCRA, citizen suits could only proceed when a violator receives notice of intent to sue and still fails to comply. *Citizens*, 90 F.3d at 1244. That is correct and that is precisely what Congress intended. The Seventh Circuit has forgotten the paramount objective of citizen suits is to encourage compliance and assist, not replace, government law enforcement. That is the theme pervading this Court's ruling in *Gwaltney*. However, the Seventh Circuit would convert that objective to a form of vigilante justice by encouraging citizen lawsuits that cannot further environmental protection but serve only to tax judicial resources, punish regulated parties, and reward citizen-plaintiffs in bounty hunter fashion.

The Seventh Circuit decision flatly contradicts this Court's reasoning in *Gwaltney* that if citizen suits may target wholly past violations, the forward-looking requirement of notice to the alleged violator becomes gratuitous. This conflict creates confusion about the purpose and scope of the citizen suit provision of EPCRA and other environmental laws. This Court should grant the writ of certiorari to rectify this confusion.

CONCLUSION

The Seventh Circuit's decision is in conflict with the Sixth Circuit's decision in *United Musical* and inconsistent with the unanimous opinion of this Court in *Gwaltney*. These conflicts place regulated entities in an untenable position by subjecting them to uncertain liability and inconsistent enforcement under EPCRA. To ensure an even-handed application of the law and avoid confusion over the scope of citizen suit provisions in environmental statutes, this Court should grant the writ of certiorari and review and overturn the Seventh Circuit decision.

DATED: November, 1996.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

**THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,**

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

**BRIEF AMICI CURIAE OF THE MID-AMERICA LEGAL
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ASSOCIATION, PETROLEUM MARKETERS ASSOCIATION
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**IDENTITY AND INTEREST
OF THE AMICI CURIAE**

Pursuant to Supreme Court Rule 37.2, the Mid-America Legal Foundation, National Association of Manufacturers, Illinois Manufacturers' Association, Petroleum Marketers Association of America and Western States Petroleum Association respectfully submit this brief as amici curiae in support of the Petitioner, The Steel Company. The members of the amici are typically subject to the environmental reporting requirements at issue in this case. Written consent was granted by counsel for all parties and filed with the Clerk of the Court.

Amicus Mid-America Legal Foundation (MALF) was organized in 1975 as an Illinois non-profit corporation to engage in study, analysis, and legal advocacy for the benefit of the general public. MALF endeavors to address evolving concepts of law as they affect free enterprise and our democratic institutions, especially where the outcome of litigation could potentially cause disruption to our national commerce, and to provide legal representation on matters of public interest on all levels of the judicial process. MALF takes a special interest in actions that originate in or have a direct effect on the Midwest region.

Amicus the National Association of Manufacturers (the NAM) is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the

NAM through its Associations Council and National Industrial Council.

Amicus Illinois Manufacturers' Association (IMA) is an Illinois not-for-profit corporation founded in 1893 and is the oldest and largest statewide manufacturing association in the United States. IMA's membership numbers more than 4,700 Illinois manufacturing companies which employ over 80 percent of the total Illinois manufacturing work force.

Amicus the Petroleum Marketers Association of America (PMAA) is the national organization representing the nation's independent petroleum marketers. PMAA is a federation of state and regional trade associations from the 48 continental states and the District of Columbia. PMAA was formed in the early 1900's to provide an advocacy group on federal legislative and regulatory issues affecting petroleum marketers. PMAA represents over 10,000 marketers of petroleum products nationwide. Collectively, these marketers sell nearly half the gasoline, over 60 percent of the diesel fuel, and approximately 85 percent of the home heating oil consumed in the U.S. annually.

Amicus the Western States Petroleum Association (WSPA) is a trade association consisting of approximately 31 individual companies engaged in the production, refining and marketing of petroleum and petroleum products. Its members are responsible for more than 90 percent of the production of oil and gas on the Pacific coast of the United States.

SUMMARY OF ARGUMENT

If not reviewed and reversed by this Court, the Seventh Circuit decision will, in conflict with a decision by the Sixth Circuit and decisions interpreting similar provisions of cognate environmental laws by this Court, expose businesses nationwide outside of the Sixth Circuit to the risk of citizen suits for past violations under the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, which were cured before the citizen suit was filed. The decision of the Seventh Circuit also presents broad policy questions of concern to the amici curiae and those whose interests they represent, which only this Court can satisfactorily address.

The Court should grant the writ to determine the appropriate role for private citizen prosecutions for past and already cured EPCRA reporting violations. As it does so, it should consider the extensive network of government control mechanisms which limit and penalize reporting failures. Congress did not, and the Court should not, extend the activity of private prosecutors under EPCRA beyond that of assuring continued compliance. If the decision below is allowed to stand, self-auditing efforts by the huge number of companies subject to EPCRA will be discouraged.

Congress left to public prosecutors, not citizens, the discretion to pursue past violations. In many cases, a governmental agency may be satisfied that a company has come into compliance with EPCRA's complex reporting requirements, however late, and elect not to seek penalties for the past violations. The Illinois legislature has even gone so far as to formally recognize that failure to report under EPCRA is not as serious as other envi-

ronmental violations and requires the Illinois Environmental Protection Agency to allow a party 30 days to cure an EPCRA reporting violation before initiating an enforcement action. Contrary to that pro-compliance goal, and in the absence of any congressional authority, the Seventh Circuit's decision encourages private citizen prosecutors to clog the courts by pursuing any past EPCRA violation, however trivial, in an attempt to maximize their attorneys' fees. The Court should carefully consider the differences between public and private enforcement of past environmental violations, the policy implications in allowing citizens to sue for past violations, along with Congress's decision not to authorize citizens to sue for past EPCRA violations, and grant Petitioner's request for a writ of certiorari.

ARGUMENT

I

CITIZEN SUITS FOR PAST PAPERWORK VIOLATIONS ARE ONLY A SMALL PART OF THE REGULATORY PICTURE THIS COURT SHOULD CONSIDER

A. Large And Small Industrial Facilities Have Significant Reporting Burdens

The Court should consider the scope and variety of reporting burdens currently imposed by environmental statutes as it considers whether or not to set private prosecutors on the trail of organizations which cure and report past EPCRA paperwork lapses. A Chemical Manufacturers Association study released this year estimated that U.S. industry is required to spend over \$2.9 billion

each year to prepare and submit reports under eight major environmental statutes: the Clean Air Act, Toxic Substances Control Act, Federal Insecticide, Fungicide, and Rodenticide Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation and Liability Act, EPCRA, Clean Water Act and Safe Drinking Water Act. 2,982,052 reports were submitted in 1994 pursuant to the 37 reporting programs mandated by these laws. The United States Environmental Protection Agency (EPA) has estimated that 54,571,915 hours of workers' time are required for filling out and submitting the reports. At the EPA's estimated \$53.00/hour cost for report preparation, the regulatory burden of this 1994 paperwork preparation is more than \$2.9 billion. Pesticide and Toxic Chemical News, April 17, 1996, at 6-8. In fact, the CMA found that EPCRA's Section 313 reporting requirements are the most onerous among all environmental reporting requirements. *Id.*

The study also details the "extensive duplication" of EPA's requirements, along with those of the Occupational Safety and Health Administration and the Chemical Diversion and Trafficking Act, which have resulted in 37 different lists of chemicals with nearly 7,000 separate reporting requirements. These lists include more than 2,400 regulated chemicals and chemical categories. *Id.* Some confusion as to which reports are required, and when they are due, is both possible and probable, even if a good faith compliance effort is made by regulated industries.

Because so many reports are required from so many facilities, and because a party's good faith efforts are no defense to an EPCRA citizen prosecution, EPCRA offers

citizen plaintiffs a huge number of potential litigation targets. EPA has estimated that 866,285 industrial facilities are subject to EPCRA Section 312 reporting requirements. 60 Fed. Reg. 35201 (July 6, 1995). Approximately 30,000 facilities are required to submit Section 313 toxic release inventory forms. See General Accounting Office, *EPA's Toxic Release Inventory Is Useful but Can Be Improved*, (June 1991) GAO/RCED 91-121. Once a citizen group identifies a company which has missed a reporting deadline (a rather easy process), the company finds itself compelled to settle on the citizen group's terms because EPCRA is a strict liability statute.

Moreover, the burdens associated with proper reporting and regulatory compliance under EPCRA are not static. EPA is intent on expanding EPCRA reporting requirements and imposing ever more regulatory burdens on industry. See EPA Press Release, *EPA Moves Toward Major Expansion of Community Right-to-Know Information About Chemical Use by Industry*, Sept. 25, 1996. Recent Federal Register notices include:

- An EPA proposal to add over 6,400 facilities to the 30,000 now required to submit Section 313 toxic release inventory reports under EPCRA. The industries newly affected would include metal mining, coal mining, electric utilities, commercial hazardous waste treatment, chemical wholesalers, petroleum wholesalers, solvent recovery services, and any manufacturing facilities which receive wastes from other facilities and manage same through treatment or disposal. 61 Fed. Reg. 33588 (June 27, 1996); see also Chemical Marketing Reporter, Vol. 250, No. 9, August 26, 1996, at 7.

- An EPA Advance Notice of Proposed Rulemaking proposing extensive new accounting and tracking requirements and occupational exposure estimates for raw and finished materials brought to, used in, and shipped or disposed of from EPCRA reporting sites. 61 Fed. Reg. 51322 (Oct. 1, 1996).

Such reporting requirements are, of course, only part of the responsibilities associated with federal, state, and local environmental regulation. Comprehensive systems of statutes, regulations, and permits govern permissible discharge limits, required control technologies, operator certification, and a wide variety of other requirements designed to reduce or control air, water, and waste discharges. Civil and criminal sanctions may be imposed if the various mandates are violated. Government enforcement actions can and do deter companies from violating paperwork requirements because a party is always subject to government sanctions for past violations. Such enforcement obviously would remain in full force and effect if the Court agrees with the Sixth Circuit's reasoning in *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473 (6th Cir. 1995), and decides that Congress intended to limit private prosecutions to those involving continuing violations.

B. Public, Instead Of Private, Control Over Prosecutorial Discretion Can Encourage Compliance

Enforcement policy is likely to significantly influence the type and extent of voluntary compliance efforts by regulated organizations. When the Department of Justice issued a 1991 guidance statement listing "regular internal or external compliance and management audits to

evaluate, detect, prevent, and remedy circumstances such as those that led to the non-compliance" as a factor which should influence a prosecutor's decision as to whether to seek criminal sanctions against a party in violation of pollution control laws, it encouraged companies to conduct such audits. Paul G. Wallach and Dan Levin, *Using Government's Guidance to Structure a Compliance Plan*, National Law Journal, Aug. 30, 1993. Private counsel are often of two minds about such activity. On the one hand, an audit program can help in enforcement negotiation. On the other, it can provide evidence of violations which can be the basis of both government and citizen enforcement actions.

The Department of Justice has in the past expressed concern about who controls enforcement policy. DOJ testimony offered during the 1987 consideration of reauthorization of the Clean Water Act argued that the flood of private enforcement actions under the Act was coming dangerously close to producing the result Congress apparently meant to prevent—a shift of control over enforcement from the government to private parties. See Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in *Environmental Politics: Public Costs, Private Rewards* 105, 120 (Praeger Publishers 1992). Those concerns are even more relevant here because the Seventh Circuit's decision grants citizen plaintiffs the same enforcement authority as the government—a result Congress could not have intended.

Current trends in industrial activity and in governmental policy favor active and voluntary compliance assurance programs. The International Standards Organiza-

tion (ISO), which creates various standards used as corporate benchmarks for quality assurance, is in the process of developing its ISO 14,000 standards series. These standards encourage companies to go beyond the letter of the law. Such efforts may require permit and technology standards negotiations, and may disclose reportable violations or previously undiscovered toxic emissions.

Companies will have little incentive to conduct voluntary audits, identify environmental compliance improvement opportunities, update missing paperwork or self-report environmental violations if citizen groups are allowed to use these actions as the basis for citizen suits. If the Court allows the Seventh Circuit's decision to stand, or if it interprets EPCRA as authorizing citizen suits for past paperwork problems, it will discourage proactive compliance on the part of U.S. industry.

C. Private Prosecutions Favor Dollar Payments, Not Compliance

Paperwork violations, unlike fugitive discharges, unpermitted emissions, nonpoint source toxic runoffs, or deliberate and concealed releases of pollutants into the environment, are relatively easy to prove. Courts have held that records compiled and submitted pursuant to regulatory requirements constitute admissions of punishable violations. See, e.g., *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120, 1130 (D. Md. 1985), *aff'd*, 874 F.2d 1109 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989). Private enforcement efforts have, in the past, focused on such paperwork violations, with effective bounties to the environmental community in the form of settlements

containing attorney's fees at market rates (which may or may not match the actual costs incurred by the citizen organizations) and "credit projects," which may finance grants to local or regional environmental organizations, grants for land acquisition, or research activity. See Greve, *Private Enforcement*, at 109-110.

Private enforcers possess enormous leverage in settlement negotiations. Violations of Sections 312 and 313 are punishable by civil penalties of up to \$25,000 per violation. Every day that a facility does not comply with the requirements of these sections is considered a separate violation. Additionally, Section 312 reports are submitted to three government agencies, 42 U.S.C. § 11022(a)(1), and Section 313 reports to two, 42 U.S.C. § 11023(a). EPA considers each agency not reported to a separate violation so that an overlooked report is more than one violation. EPA penalty policies assess a base amount for the first day of violation determined by statutorily mandated factors, including the seriousness of the violation, the size of the violator, the quantity of toxic chemicals used, prior history of violations, the violator's "attitude," ability to pay, and other factors. This base amount is assessed for the first day of violation, and subsequent days are also penalized. See *Petition for Certiorari* at A7.

Where an enforcement agency is involved, "attitude" and the organization's history of compliance efforts is relatively easily determined. Other compliance investments, the reputation and activity of the violator, and the number and types of violations encountered may be given great weight in settlement, with future compliance assurance and prospective later permit and other negoti-

ations between the parties always a main focus. Where a private prosecutor pursues a violation, however, similar concerns are not present. The citizen organization simply has no economic interest in settling for less than the maximum possible penalty. See Greve, *Private Enforcement*, at 109-113.

The subject case indicates the injustice of permitting private, rather than public, prosecutions. According to EPA's Section 313 policy, EPA will reduce a penalty by 30% if a party cooperates with EPA and quickly complies with reporting requirements once it is informed of the violation. EPA EPCRA Section 313 Penalty Policy (Aug. 10, 1992), at 18. The Steel Company's quick compliance would entitle it to the reduction if the EPA were bringing an action.

On the other hand, when a private prosecutor sends a notice of intent to sue, parties who do not settle quickly on the prosecuting group's terms and choose to defend their rights are likely to face increased settlement demands. The tactics of Citizens for a Better Environment (CBE) illustrate how these "citizen" groups operate. The day after the Seventh Circuit announced its decision, CBE sent letters to several companies which had earlier received CBE notices of intent to sue. CBE threatened to file suit unless the companies made "acceptable" settlement offers "taking into account your attitude of failing to settle earlier . . . along with CBE's increased costs." CBE July 24, 1996 Correspondence at A1-A2. (The company's and its attorney's names have been deleted because several companies have either been sued or are in settlement negotiations with CBE.)

The Seventh Circuit was obviously mistaken that Congress intended the 60-day notice period to allow "a would-be champion to try negotiation before litigation." Petition for Certiorari at A14 (citation omitted). To the contrary, there is no arm's length negotiation in an EPCRA citizen action, and citizen groups use the notice period to attempt to intimidate parties into generous settlements. The Court should consider the economic incentives and motives which apply to private prosecutions, and limit their scope to no more than what Congress specifically intended.

II.

PRIVATE ACTIONS ARE LIMITED BY PUBLIC POLICIES EXPRESSED IN FEDERAL AND STATE STATUTES

A. Modern Environmental Statutes Show Congressional Concern With The Possible Abuse Of Citizen Suit Authority

As Petitioner details, Congress has permitted and the Court has upheld limited private prosecutions under various federal environmental statutes. Petition for Certiorari at 8, 19-20. Commentators have noted that the legislative histories of these statutes "indicate some congressional caution about giving private parties the power to enforce regulatory statutes." Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 846 (1985). Explicit limitations on citizen suits include provisions directing fines to the U.S. Treasury, and not to citizen plaintiffs. See Greve, *Private Enforcement*, at 106. Whatever the practical results (and commentators like Mr. Greve have argued that the set-

tlement process in citizen suits already provides a nonappropriated entitlement program for the environmental movement), it is clear that Congress can and has established a policy of limitation of private activity in and profit from environmental enforcement action. In *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), this Court noted that:

If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of state authorities. Respondents' interpretation of the scope of citizen suit would change the nature of the citizen's role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

The same concerns that this Court had with citizen suits for past Clean Water Act violations are present in EPCRA actions. Citizen plaintiffs should not be permitted to file suit for past violations that EPA chose to resolve with little or no penalty. The Court should take this case to determine whether the concerns it had regarding the Clean Water Act control here as they did in *Gwaltney*.

B. Congress Did Not Choose To Permit Citizen Suits For Past Violations Of EPCRA

Respondents below suggested, and the Seventh Circuit agreed, that Congress's inclusion of a 60-day notice period, along with explicit permission for citizen suits for some past violations, in the Clean Air Act Amendments

of 1990, 42 U.S.C. § 7604(a), means that a court should hold that citizens should be able to sue for past EPCRA violations even without such explicit permission. Petition for Certiorari at A13. Leaving aside the constitutional question of citizen standing to sue for past violations even with such explicit permission, Petition for Certiorari at 16-19, the legal argument suggested is inconsistent with ordinary principles of statutory interpretation. The first question is, of course, whether an amendment to a statute on a different subject (Clean Air) would have any effect on one concerned with emergency planning. Absent any explicit cross-reference, or specific repeal, the usual principle of common law, that the law does not favor repeal or amendment of an older statute by a newer one by mere implication, applies. See, e.g., *United States v. Fausto*, 484 U.S. 439, 453 (1988). This Court decided early that repeal or amendment by implication is possible only if it arises out of a clear repugnancy between two laws, and that the newer law abrogates the older only to the extent that it is inconsistent and irreconcilable with it. *Chew Heong v. United States*, 112 U.S. 535, 549 (1884); *Wood v. United States*, 16 Pet. 342, 362-63, 10 L. Ed. 987, 995 (1842).

No amendment by implication is possible here. Congress could have chosen to amend all environmental statutes to explicitly permit suits for past violations after this Court's *Gwaltney* decision. It did not do so. It could, and did, insert explicit permission for suits for some past violations in the Clean Air Act Amendments of 1990. Absent such explicit permission, the 60-day notice requirement of EPCRA should be given the meaning intended by Congress and determined by the Court in

Gwaltney. The Seventh Circuit should be directed to conform its interpretation to that of the Court, and of Congress.

C. Illinois Law Favors Self-Reporting And Efforts To Come Into Compliance, Not Paperwork Prosecutions

If the Court decides that federal law permits private enforcement even when a paperwork violation has been cured and despite a 60-day notice period, it will ignore the policy implications of recent Illinois law. The Illinois General Assembly recognized that the failure to report under EPCRA is not as serious as other environmental violations and therefore amended the Illinois Environmental Protection Act to require the Illinois EPA to give a party 30 days' opportunity to bring EPCRA paperwork into compliance. 415 ILCS 5/25b-6, eff. Jan. 1, 1994. The Illinois legislature has not provided a similar grace period if actual harm to the environment such as contamination to the air, water, or land is involved. As a matter of public policy, private prosecutors should not be given more opportunity to enforce EPCRA than the State of Illinois chooses to permit itself.

CONCLUSION

A careful limitation of citizen prosecutions to instances where significant or continuing harm to the public is likely is a rational choice, and serves important public policy interests. Petitioner has suggested that Congress intended such a limitation in 42 U.S.C. § 11046, a position the Sixth Circuit has endorsed. The Court should

grant the Petition for a Writ of Certiorari, overrule the Seventh Circuit, and restore the appropriate interpretation.

Respectfully submitted,

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A1

APPENDIX

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Telephone (312) 427-3777
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July 24, 1996

VIA FACSIMILE
[COMPANY'S ATTORNEY]

Re: EPCRA Violations by [COMPANY]

Dear [COMPANY'S ATTORNEY]:

This letter relates to [COMPANY'S] EPCRA violations and Citizens for a Better Environment's ("CBE") Notice of Intent to Sue. It is protected from disclosure under Fed. R. Evid. 408.

Yesterday the United States Court of Appeals for the Seventh Circuit ruled that citizens, such as CBE, are authorized to file suit under EPCRA for, among other things, failure to meet the statutory filing deadlines. [COMPANY] has clearly failed to meet the statutory filing deadlines for years.

If you are interested in settling this matter with CBE, we will entertain an offer for a short period of time. Unless we receive an acceptable offer of settlement, reflecting penalties as set forth by EPA's policies, taking

A2

into account your attitude of failing to settle earlier (and failing to improve the environment by promptly initiating a Supplemental Environmental Project), along with CBE's increased costs, we will take action on or before August 7, 1996. In such case, penalties will go to the U.S. Treasury.

Sincerely,

/s/

James D. Brusslan

JDB/lk

cc: Stefan A. Noe

No. 96-643

Supreme Court U.S.

FILED

MAY 2 1997

DEPARTMENT OF THE CLERK

In The
Supreme Court of the United States

October Term, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL
AND PICKLING COMPANY,

Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed October 21, 1996
Petition For Writ Of Certiorari Granted February 24, 1997

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<i>The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:</i>	
Opinion of the United States District Court for the Northern District of Illi- nois, dated December 19, 1995	A17
Judgment of the United States District Court for the Northern District Of Illi- nois, entered on December 19, 1995	A27
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RELEVANT DOCKET ENTRIES**DATE: 1995**

March 16	Citizens for a Better Environment's notice of intent to sue letter to The Steel Company sent.
Aug. 7	Citizens for a Better Environment's Complaint against the Steel Company for Injunctive Relief and Civil Penalties filed in U.S. District Court for Northern District of Illinois, Eastern Division.
Sept. 5	The Steel Company's motion to dismiss filed.
Dec. 19	Opinion and judgment of District Court, granting The Steel Company's motion to dismiss.

DATE: 1996

Jan. 17	CBE's notice of appeal filed.
July 23	Opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit, reversing decision of District Court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

CITIZENS FOR A BETTER)	(Filed Aug. 7, 1995)
ENVIRONMENT, a)	
not-for-profit corporation,)	
)	
Plaintiff,)	
)	95 C 4534
v.)	
THE STEEL COMPANY, a/k/a)	
CHICAGO STEEL AND)	
PICKLING COMPANY, a)	
corporation,)	
)	
Defendant.)	

CITIZENS FOR A BETTER
ENVIRONMENT'S COMPLAINT
AGAINST THE STEEL COMPANY FOR
INJUNCTIVE RELIEF AND CIVIL PENALTIES

INTRODUCTION

1. This is a citizen suit filed by Citizens for a Better Environment ("CBE") against The Steel Company for violating the Emergency Planning and Community Right-to-Know Act ("EPCRA" or "the Act"), of 1986, 42 U.S.C. § 11001, *et seq.* for eight years. The Steel Company failed to inform the government and the public, including CBE and its members, of the presence and use at its facility, and thus, in the community, of large amounts of hazardous and toxic chemicals. EPCRA, which was enacted in 1986, has resulted in the elimination of over a million

tions of toxic and hazardous chemicals into our environment. The government and its citizens use the information filed under EPCRA: (a) to learn about toxic and hazardous chemicals to which they are, or may be, exposed; (b) to develop plans for, and respond to, accidental releases of toxic and hazardous chemicals into the environment; (c) to work with companies to reduce the use of toxic and hazardous chemicals; and (d) to gather data and conduct research on these toxic and hazardous chemicals. By withholding information on the presence and use of toxic and hazardous chemicals at its facility, The Steel Company has deprived citizens, including members of CBE, of information which Congress has determined is crucial to the public health and welfare. CBE seeks a declaratory judgment, injunctive relief, the imposition of civil penalties, and the award of costs, including attorney and expert witness fees, for defendant's repeated violations of Sections 312 and 313 of EPCRA, 42 U.S.C. §§ 11022 and 11023.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction under Section 326(a) of EPCRA, 42 U.S.C. § 11046(a).

3. On March 16, 1995, plaintiff gave notice of defendant's violations of EPCRA and its intent to file suit to the Administrator of the U.S. Environmental Protection Agency (EPA), to the Regional Administrator of the EPA Region V, to the Illinois Environmental Protection Agency (IEPA), the Illinois Governor, and defendant, as required by § 326(d)(1) of the Act, 42 U.S.C. § 11046(d)(1). A copy of the Notice Letter is attached as Exhibit A.

4. More than sixty (60) days have passed since notice was served. The EPA has neither commenced, nor is diligently pursuing, an administrative order or a civil action with respect to the violations.

5. Venue is appropriate in the Northern District of Illinois pursuant to Section 326(b)(1) of EPCRA, 42 U.S.C. § 11046(b)(1), in that the violations of EPCRA occurred and occur in this District.

PLAINTIFF

6. Plaintiff, Citizens for a Better Environment (CBE), sues on behalf of both itself and its members. CBE is a midwest-based, not-for-profit corporation organized under the laws of Illinois in 1971, with offices in Illinois, Minnesota and Wisconsin. CBE is a membership organization with approximately 30,000 members and over 180,000 contributors. CBE members are located throughout the State of Illinois, but predominately in north-eastern Illinois, including the southeast side of Chicago where defendant's facility is located. CBE's Illinois office is located in Chicago, Illinois.

7. CBE attempts to prevent environmental health threats through research, advocacy, public education, and citizen involvement. CBE also seeks to increase the public's awareness of the impact of human endeavors upon the natural environment and to further the public's understanding of the need of the people to live within the natural environment without destroying its ecology.

8. CBE seeks, acquires, and uses data reported by facilities under EPCRA in its programmatic activities.

Based on this data, CBE reports to its members and the public about storage and releases of toxic chemicals into the environment, advocates changes in environmental regulations and statutes, prepares reports for its members and the public, seeks the reduction of toxic chemicals and further seeks to promote the effective enforcement of environmental laws. CBE's use of this data depends on the timely and complete submission of information pursuant to EPCRA. CBE's right to know about such releases and its interests in protecting and improving the environment and the health of its members have been, are being, and will be adversely affected by defendant's actions in failing to provide timely and required information under EPCRA.

9. Members of CBE reside, own property, engage in recreational activities, breathe the air, and/or use areas near defendant's facility. These members use and enjoy the benefits of natural resources near facilities which store, process, or otherwise use, toxic and hazardous substances listed under Section 312 and 313 of EPCRA. CBE's members seek, acquire and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit. The safety, health, recreational, economic, aesthetic and environmental interests of CBE's members and their right to know about such releases have been, are being, and will be adversely affected by defendant's actions in failing to file timely and required reports under EPCRA.

DEFENDANT

10. Defendant, The Steel Company a/k/a Chicago Steel & Pickling Company is a corporation organized under the laws of the State of Illinois. Since at least 1987 to the present, defendant has owned and/or operated industrial facilities at 12500 S. Stony Island Avenue, Chicago, Illinois. As part of its operations, defendant removes rust from steel coils, a process otherwise referred to as steel pickling.

FACTS

11. Defendant is the owner and operator of a steel pickling facility that removes rust from large steel coils. The steel is uncoiled and put through an acid bath to remove all rust. It is then oiled and re-coiled.

12. From 1987 to the present, defendant has had 10 or more full-time employees at its facility, and its Standard Industrial Classification code is 3479.

13. From 1987 to the present, defendant was required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 651 *et seq.*

14. From 1987 to the present, defendant has had extremely hazardous substances present at its facility in amounts greater than or equal to 500 pounds and other hazardous substances present in amounts greater than or equal to 10,000 pounds. These chemicals include, but are not limited to:

Hydrochloric Acid (CAS #7647-01-0)

Sodium Hydroxide (CAS #1310-73-2)

Ferrous Chloride (CAS #7758-94-3)

15. From 1987 to the present, defendant "otherwise used," as the term is defined in the Act, more than 10,000 pounds per year of one or more toxic chemicals listed at 40 C.F.R. 372.65, including hydrochloric acid (CAS #7647-01-0).

COUNT I

Failure to Report Emergency and Hazardous Chemical Inventory Forms

16. Plaintiff restates and incorporates by reference the above-numbered paragraphs.

17. The requirements of Section 312(a) of EPCRA, 42 U.S.C. §11022(a), apply to owners or operators of a facility which are required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 651 *et seq.*, and have the hazardous chemical present at or above the minimum threshold quantity for reporting at any one time. For extremely hazardous substances that are listed in the Appendices of 40 C.F.R. Part 355, the minimum threshold level for reporting is 500 pounds or the threshold planning quantity (TPQ), whichever is lower. For all other hazardous chemicals the minimum threshold level for reporting is 10,000 pounds.

18. The owners and operators of such facilities are required under Section 312(a), 42 U.S.C. § 11022(a), to

prepare and submit an emergency and hazardous chemical inventory form, on or before March 1, 1988, and annually thereafter on March 1, to the appropriate local emergency planning committee (LEPC), the state emergency response commission (SERC) and the fire department with jurisdiction over the facility.

19. These chemical inventory forms provide information concerning the maximum amount, the average daily amount and the location of hazardous chemicals present at the facility.

20. Facilities that fail to submit chemical inventory forms after the March 1 deadline have failed to comply with the annual reporting requirement and have defeated the purposes of EPCRA, which are to inform people, annually and in a timely manner, about the presence of hazardous chemicals, to assist in local emergency planning and response, and to aid in the development of appropriate regulations, guidelines and standards.

21. From 1987 to the present, Defendant owned and operated a facility that has had hazardous and extremely hazardous chemicals present at or above the minimum threshold level for reporting, and is therefore subject to the requirements of Section 312 of EPCRA, 42 U.S.C. § 11022.

22. Defendant failed to submit chemical inventory forms to the SERC, the LEPC and the appropriate fire department, on or before March 1, 1988, and annually thereafter through March 1, 1995.

23. Defendant's violations of Section 312 of the Act have been numerous and repeated. Each day that each

toxic chemical is not reported constitutes a separate violation of EPCRA. Since 1988, defendant has committed over 19,000 violations of Section 312 of EPCRA. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), authorizes civil penalties in an amount not to exceed \$25,000 for each violation of the requirement to submit chemical inventory forms.

COUNT II

Failure to Report Toxic Chemical Release Forms

24. Plaintiff restates and incorporates by reference paragraphs 1 through 14.

25. The requirements of Section 313 of EPCRA, 42 U.S.C. § 11023, apply to owners and operators of facilities that have ten or more full-time employees, are in Standard Industrial Classification Codes 20-39 (SIC Codes 2000-3999), and that manufacture, process or otherwise use designated toxic chemicals in excess of the threshold quantities established under 42 U.S.C. § 11023(f). A list of designated chemicals is set forth in 40 C.F.R. Part 372.65.

26. The owners and operators of such facilities are required under Section 313, 42 U.S.C. § 11023, to complete and submit to the EPA and the designated state agency, on or before July 1, 1988, and annually thereafter on or before July 1, a toxic chemical release form (Form R) for each listed toxic chemical manufactured, processed, or otherwise used in excess of the threshold quantities. Among other things, each Form R must contain data reflecting annual releases of toxic chemicals into all environmental media, i.e., the air, land and water.

27. Facilities that fail to submit chemical release forms after the July 1 deadline have failed to comply with the annual reporting requirement and have defeated the purposes of EPCRA, which are to inform people, annually and in a timely manner, about the releases of hazardous chemicals into their environment, to assist governmental agencies and others in the conduct of research and data gathering, and to aid in the development of appropriate regulations, guidelines and standards.

28. From 1987 to present, defendant owned and operated a facility that manufactured, processed or otherwise used a designated chemical over the threshold quantity for reporting, and was therefore subject to the requirements of Section 313 of EPCRA, 42 U.S.C. § 11023.

29. Defendant failed to timely submit chemical release forms to the EPA and designated state agency on or before July 1, 1988, and annually thereafter on July 1, 1994.

30. Defendant's violations of the Act have been numerous and repeated. Each day that each toxic chemical is not reported constitutes a separate violation of EPCRA. Since 1988, defendant has committed over 2500 violations of Section 313 of EPCRA. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), authorizes civil penalties in an amount not to exceed \$25,000 for each violation of the requirement to submit chemical release forms.

RELIEF

WHEREFORE, plaintiff respectfully requests this Court to grant the following relief:

A. Issue a declaratory judgment that defendant, The Steel Company, has violated Sections 312 and 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11022 and 11023;

B. Authorize plaintiff, for the period beginning on the date of the Court's Order and running at least one year thereafter, to inspect defendant's facility and records for compliance with all of the provisions of EPCRA, with the cost of inspection to be borne by defendant;

C. Order defendant to provide plaintiff, for a period beginning on the date of the Court's order and running at least one year thereafter, with a copy of all reports and other documents which defendant submits to the EPA or to the SERC regarding defendant's compliance with the provisions of EPCRA at the time it is submitted to these authorities;

D. Order defendant to pay civil penalties of \$25,000.00 per day of violation for each violation of Sections 312 and 313, 42 U.S.C. §§ 11045(c) and 11046(c).

E. Award plaintiff all of its costs, in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees, as authorized by Section 326(f) of the Act, 42 U.S.C. § 11046(f); and

F. Award such other and further relief as this Court deems appropriate.

DATED: August 7, 1995

Respectfully submitted,

CITIZENS FOR A BETTER ENVIRONMENT

By: /s/ Stefan Noe
One of its attorneys

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EXHIBIT A

**Citizens for a
Better
Environment**

March 16, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. K. Rajkumar, President
The Steel Company
12500 S. Stony Island Avenue
Chicago, Illinois 60633

Mr. James N. Johnson, Registered Agent
The Steel Company
12500 S. Stony Island Avenue
Chicago, Illinois 60633

Re: Notice of Intent to Sue Pursuant to the Citizen
Suit Provision of the Emergency Planning and
Community Right to Know Act.

Dear Mr. Rajkumar and Mr. Johnson:

NOTICE IS HEREBY GIVEN by Citizens for a Better Environment ("CBE"), pursuant to section 326(d) of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11001-11050, and all pertinent regulations promulgated thereunder, of CBE's intent to file suit against The Steel Company a/k/a Chicago Steel & Pickling Company, ("The Steel Company") for violations of EPCRA.

Section 326(d) of EPCRA, 42 U.S.C. § 11046(d), requires that sixty (60) days prior to the institution of a civil action under the authority of Section 326(a), 42 U.S.C.

§ 11046(a), a citizen must give notice of intent to sue. CBE will file a civil action in federal district court after the expiration of this notice period.

This lawsuit will allege, upon information and belief, that The Steel Company, as the owner or operator of the manufacturing facility located 12500 S. Stony Island Avenue, Chicago, Illinois ("the facility"), has failed to accurately complete and submit:

- A. Emergency and Hazardous Chemical Inventory Forms ("Tier One or Tier Two Forms") by March 1, 1988, and annually thereafter, pursuant to Section 312 of EPCRA, 42 U.S.C. § 11022; and
- B. Toxic Chemical Release Forms (EPA Form Rs) by July 1, 1988, and annually thereafter, pursuant to Section 313 of EPCRA, 42 U.S.C. § 11023.

As the owner or operator of the facility, The Steel Company is responsible for its failure to submit the above-referenced forms.

CBE is informed and believes that in The Steel Company's operations it has used or stored extremely hazardous substances or hazardous substances which exceed the threshold planning quantities for reporting. The Steel Company has failed to complete Tier One or Tier Two Inventory Forms for those chemicals.

Furthermore, CBE is informed and believes that in the operations at the facility, The Steel Company has "manufactured," "processed" or "otherwise used" one or more "toxic chemicals," as those terms are defined by EPCRA, in excess of statutory thresholds and is thereby subject to

the reporting requirements of section 313 of EPCRA. The chemicals used above the threshold reporting quantities includes, but is not limited to, Hydrochloric Acid (CAS #7647-01-0). CBE believes that The Steel Company continues to be in violation of EPCRA.

CBE will request that the court enforce the requirements of Sections 312 and 313 of EPCRA, impose civil penalties of \$10,000 per day and \$25,000 per day of violation from the required dates of submittal, and award costs of litigation (including reasonable attorneys' and expert witness' fees) to CBE.

During the notice period we will be available to discuss resolution of The Steel Company's noncompliance with the law. If you wish to avail yourself of this opportunity, please contact me.

Sincerely,

By: /s/ Stefan A. Noe
Stefan A. Noe
Staff Attorney

By: /s/ James D. Brusslan
James D. Brusslan, Esq.
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Environment

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Chicago, Illinois 60604

Mary A. Gade, Director
Illinois Environmental Protection Agency
2200 Churchill Road
Springfield, Illinois 62706

Governor
The Honorable Jim Edgar
State House
Springfield, Illinois 62706

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CITIZENS FOR A BETTER)	
ENVIRONMENT, a)	Case No. 95 C 4534
not-for-profit corporation,)	
Plaintiff,)	Judge Marovich
)	
v.)	Magistrate
THE STEEL COMPANY, a/k/a)	Judge Pallmeyer
CHICAGO STEEL AND)	
PICKLING COMPANY,)	(Filed Sept. 5, 1995)
)	
Defendant.)	

**THE STEEL COMPANY'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

Defendant, The Steel Company, by its undersigned attorneys and pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, requests that this Court enter an order dismissing the complaint of plaintiff, Citizens for a Better Environment ("CBE"). In support of its motion, The Steel Company states as follows:

1. On or around March 20, 1995, The Steel Company received CBE's 60-day notice of intent to sue under Section 326(d)(1) of the Emergency Planning and Community Right-to-Know Act ("EPCRA"). 42 U.S.C. § 11046(d)(1). ¶3 of Plaintiff's Complaint. In its notice, CBE alleged that The Steel Company failed to complete and submit certain forms as required by Section 312 and 313 of EPCRA. 42 U.S.C. §§ 11022, 11023.

2. After receiving CBE's notice of intent to sue and before the 60-day notice period had expired, The Steel

Company tasked Gabriel Environmental Services, its environmental consultant, to complete the forms. On May 1, 1995, The Steel Company submitted the completed forms to the appropriate regulatory authorities. (A copy of the transmittal letters accompanying The Steel Company's forms is attached as Exhibit B to The Steel Company's Memorandum in Support.)

3. On August 7, 1995, notwithstanding The Steel Company's having submitted the forms prior to the running of the 60-day notice period, the CBE filed suit against The Steel Company alleging the same violations of EPCRA as alleged in its 60-day notice letter.

4. This Court does not have federal subject matter jurisdiction over this action as there is no case or controversy between The Steel Company and the CBE because The Steel Company was unquestionably in compliance with the requirements of EPCRA before the 60-day notice expired. In the alternative, the CBE's complaint fails to state a cause of action upon which relief can be granted EPCRA does not authorize a citizens' suit plaintiff, like the CBE, to file suit "for past violations that have been cured by the date the action commences. . . ." *Atlantic State Legal Found., Inc., v. United Musical Instruments*, No. 93-4379, 1995 U.S. App. LEXIS 20469, at *5 (6th Cir. Aug. 3, 1995) (attached as Exhibit A to the Steel Company's Memorandum in Support). See also *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59-61 (1987).

5. In support of its Motion to Dismiss, The Steel Company is contemporaneously filing a memorandum of law.

WHEREFORE, Defendant, The Steel Company, respectfully requests that this Court enter an order dismissing plaintiff's complaint.

THE STEEL COMPANY

By: /s/ Leo P. Dombrowski
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No. 96-643

Supreme Court, U.S.

FILED

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In The
Supreme Court of the United States
October Term, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,
vs.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, in enacting the citizen suit provision of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, Congress intended to authorize citizens to seek penalties for violations that were cured before the citizen suit was filed, thereby granting EPCRA citizen suit plaintiffs greater enforcement authority than that granted to citizen suit plaintiffs under other federal environmental statutes.

STATEMENT PURSUANT TO RULE 29.6

The Steel Company, a corporation, has no parent companies or non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. A1-A15) is reported at 90 F.3d 1237. The opinion of the United States District Court for the Northern District of Illinois (Pet. App. A17-A26) is reported at 42 Env't Rep. Cases (BNA) 1186.

 JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on July 23, 1996. Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) in a Petition filed on October 21, 1996. This Court granted the Petition on February 24, 1997.

 STATUTORY PROVISIONS INVOLVED

Section 326 of EPCRA, 42 U.S.C. § 11046, provides in pertinent part:

(a)(1) Except as provided in subsection (e) of this section, any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

* * *

(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason

of the second sentence of section 11022(a)(2) of this title.

(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

* * *

(b)(1) Any action under subsection (a) of this section against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

* * *

(c) The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement.

* * *

(d)(1) No action may be commenced under subsection (a)(1)(A) of this section prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator.

* * *

(e) No action may be commenced under subsection (a) of this section against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this chapter with respect to the violation of the requirement.

—◆—

STATEMENT OF THE CASE

Petitioner The Steel Company is a small, minority-owned steel pickler and reduction mill located on the industrial southeast side of Chicago. It has about 55 employees and has been in business since 1971. The Steel Company is regulated by several air, water, hazardous waste, and other environmental requirements. Upon beginning its operations and regularly since then, The Steel Company has been inspected by federal, state and local regulatory agencies. It has willingly complied with these numerous and appropriate requirements, and yet, despite all of this regulatory activity, it remained uninformed that in addition it must file forms under EPCRA. Upon notice, it quickly responded, filing past and current forms, and since then has remained in timely compliance.

Moreover, much of the information required by EPCRA is reported to government agencies in other forms. For example, in 1991, The Steel Company submitted a Chemical Safety Contingency Plan to the Chicago Fire Department, Chicago Police Department and two local hospitals detailing the chemicals present at the facility and their chemical properties and locations.¹

The Steel Company's main process is steel pickling, which is a finishing operation that removes scale and rust

¹ A copy of relevant excerpts of the Contingency Plan has been lodged with the Court.

from steel coils to ensure uniform shape and provide a surface that is easily coated or further processed. "Scale" is a black or gray coating of oxide which forms on steel as it cools. Rust is a reddish brittle coating formed on steel as it is attacked by moist air over time.

Steel coils are first unwound and then pulled through a series of sealed tanks containing diluted hydrochloric acid or "pickle liquor." The acid bath removes the scale and rust, which dissolve in the pickling tanks. The spent pickle liquor is shipped off-site, according to applicable regulations, by licensed transporters to licensed facilities and then recycled in other processes. For example, municipalities use The Steel Company's spent liquor in their wastewater plants to treat sewage. Industry also recycles the spent liquor as a raw material to make iron oxide, which is used as a coating for audio, video and computer tapes.

After passing through the pickling tanks, the steel is washed with high-pressure rinse water sprays to remove any remaining acid and is then air-dried. Most of the rinse water is recycled back into the pickling tanks. Excess rinse water is collected in a holding tank and treated on-site to adjust the pH factor and to remove dissolved and undissolved solids in accordance with applicable regulations. Only the neutralized and cleaned water is discharged to the local Chicago water treatment works. Over 95 percent of The Steel Company's waste hydrochloric acid and waste rinse water is either recycled off-site or treated on-site. See The Steel Company's 1992-95 Form Rs at p. 9, attached to its Reply Memorandum in Support of Motion to Dismiss at Exh. B.

A. The Purpose and Structure of EPCRA

In 1986, in response to several chemical releases, including the tragedy in Bhopal, India and other smaller incidents in the United States, Congress enacted EPCRA, which includes certain reporting requirements for industrial facilities. Pet. App. A2. Congress was reacting to a perceived lack of reliable and accessible information regarding the location and use of chemicals, and passed EPCRA to fill "this informational void and improv[e] emergency response capabilities." *Id.* The main purposes of EPCRA are thus twofold: 1) to compile information on the presence and release of chemical substances and make that information available to the public; and 2) to use the reported information to help formulate emergency response plans to react to accidental releases of chemicals. *Id.* A2-A4. Although Congress realized that much of industry's chemical data was already available to the public, it also knew that the information was listed on several different forms and located in different places. Congress thus recognized a need to have the information readily available to the public in a comprehensible form.² *Id.* A3.

While it is difficult to measure EPCRA's effect on industry behavior (EPCRA requires no emission controls or reductions), some claim that EPCRA's "public release

² While the Seventh Circuit rightly noted that "most of the required information must be compiled and reported for other purposes," it was severely mistaken that "the cost of compliance with EPCRA's reporting requirements is low." Pet. App. A4. See, e.g., Amicus Brief of Chemical Manufacturers Association in Support of Petitioner regarding costs and burdens of EPCRA reporting.

of information about discharge of toxic chemicals has by itself spurred competition to reduce releases, quite independently of government regulation." *Id.* A2 (citation omitted). Notwithstanding the public's increased awareness of chemical use, other factors also play a role in influencing industry. The United States Environmental Protection Agency (EPA) acknowledges that financial incentives, in addition to EPCRA's reporting obligations, motivate industry to reduce its emissions. 61 Fed. Reg. 38600, 38602 (July 25, 1996). Whatever its role, EPCRA has contributed to the significant improvement in the nation's environmental quality over the past decade.

Of the six EPCRA reporting requirements applicable to industry, two are at issue here. Section 312 requires certain facilities to submit inventory forms, which provide information regarding the amount and location of "hazardous chemicals" at a facility, to state and local agencies. 42 U.S.C. § 11022(a), 11022(d). The inventory forms for a given calendar year are due by March 1 of the following year. 42 U.S.C. § 11022(a). Approximately 870,000 facilities are required to report under Section 312. 61 Fed. Reg. 67017, 67018 (Dec. 19, 1996).

Section 313 requires certain manufacturing facilities using any of approximately 650 specified "toxic chemicals" to submit forms which provide information about the amount of those chemicals at a facility and their release, if any, into the environment, including allowable releases authorized by agency permits or licensed disposal facilities. Section 313 forms are submitted to the EPA and a designated state official. 42 U.S.C. §§ 11023(a), 11023(g). EPA has created the "Form R" as its uniform chemical release form, 40 C.F.R. § 372.85, which for a given calendar year is due by July 1 of the following year.

42 U.S.C. § 11023(a). Approximately 30,000 facilities are required to file Form Rs. *EPA's Toxic Release Inventory Is Useful but Can Be Improved*, at 49 (June 1991) GAO/RCED 91-121.

In expanding EPCRA's reporting requirements in 1990, Congress declared that "the national policy of the United States [is] that pollution should be prevented or reduced at the source whenever feasible." 42 U.S.C. § 13101(b). As part of the strategy to promote source reduction, Congress required facilities subject to Section 313 to include "a toxic chemical source reduction and recycling report" in their annual filings. *Id.* at § 13106(a).

Violators of Sections 312 and 313 may be liable to the United States for civil penalties up to \$25,000 for each day of each violation. 42 U.S.C. § 11045(c)(1 & 3). EPA may seek penalties either in an administrative action or in federal court. *Id.* at § 11045(c)(4).

EPCRA authorizes citizens to sue regarding four of the six reporting requirements. In pertinent part, EPCRA provides that "any person may commence a civil action on his own behalf against . . . an owner or operator of a facility for failure to . . . [c]omplete and submit an inventory form under section [312] [or] a toxic chemical release form under section [313]. . . ." *Id.* at § 11046(a)(1)(A)(iii & iv). A would-be citizen plaintiff is first required to provide notice of the alleged violation to EPA, the state, and the alleged violator, and must wait at least 60 days before filing suit. *Id.* at § 11046(d)(1). If EPA elects to pursue the violator administratively or in court, however, the citizen is barred from duplicating that effort and may not file suit. *Id.* at § 11046(e). Although EPCRA's legislative history is silent on the purpose of the notice period, in

examining the citizen suit notice provision of the Clean Water Act (CWA), this Court found that one purpose of the notice was to allow the violator an opportunity to come into compliance, thus rendering a citizen suit unnecessary. *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

In presiding over a citizen suit, a district court has jurisdiction "to enforce the requirement concerned and to impose any civil penalty provided for a violation of that requirement." 42 U.S.C. § 11046(c). A court may award costs of litigation, including attorneys' fees, "to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate." *Id.* at § 11046(f).

B. Proceedings Below

On March 16, 1995, Citizens for a Better Environment (CBE) sent to the EPA, Illinois Environmental Protection Agency (IEPA), and The Steel Company an EPCRA 60-day notice of intent to sue alleging that The Steel Company had not submitted certain forms as required by Sections 312 and 313. Up to that point, The Steel Company was uninformed about EPCRA.³ Upon receiving the notice, The Steel Company tasked its environmental consultant and attorneys to investigate EPCRA's requirements, and on May 1, 1995, before the 60-day notice period had expired, it submitted Sections 312 and 313 forms for all reporting years to the EPA, IEPA, the Illinois

³ The Seventh Circuit noted that, "Many industrial facilities subject to the Act remained unaware of its existence long after it went into effect." Pet. App. A2 (citation omitted).

Emergency Management Agency, and the Chicago Fire Department. J.A. 17-18; Pet. App. A19, A25.

Notwithstanding The Steel Company's compliance within the 60-day period, on August 7, 1995, CBE filed suit. CBE alleged only past EPCRA violations, and, significantly, did not seek injunctive relief ordering The Steel Company to comply with EPCRA, as compliance had already been achieved. J.A. 11; Pet. App. A19, A25. While The Steel Company's omissions amounted to a failure to submit the inventory form once each year for eight years for three chemicals and the Form R once each year for seven years for one chemical, CBE calculated these omissions as multiple and daily, amounting to 21,500 violations. At \$25,000 per day for each violation, CBE requested penalties of over \$537 million.⁴ J.A. 8-11.

The Steel Company filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguing that there was no Article III case or controversy and also that Sixth Circuit and Supreme Court precedent barred the action. J.A. 18. Relying on the Sixth Circuit's opinion in *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473 (6th Cir. 1995), the district court granted The Steel Company's motion:

⁴ In contrast, EPA's Penalty Policies treat first-time violations as "one-day" violations. EPA assesses "per day" penalties only in cases of egregious violators, such as those who were previously the subject of an EPA enforcement action. EPA Section 312 Penalty Policy (June 13, 1990) at 8, 20-21. EPA Section 313 Penalty Policy (Aug. 10, 1992) at 11, 13-14.

This Court concludes that § 326(a) of EPCRA does not provide the right for a citizen to sue for historical violations of the Act. The "complete and submit" language of that section, along with the purpose of the notice provision and Congress' intended role for the citizen-plaintiff, leads the Court to that decision. . . . In addition, it is uncontested that before the Complaint was filed, Steel Company filed the proper forms with the required agencies for the relevant periods in response [to] CBE's notice of intent to sue. If it were not the case it seems likely that CBE would have included such an allegation in their complaint; no such allegation is present. Because the Complaint alleges only a failure to timely file the required reports, a violation of the Act for which there is no jurisdiction for a citizen suit, the Court dismisses the Complaint.

Pet. App. A24-A26 (footnotes omitted).

The district court noted the Sixth Circuit found support for its decision in *Gwaltney* where this Court held that one purpose of the 60-day non-adversarial notice period is to allow the alleged violator an opportunity to come into compliance. Pet. App. A23-A24. This Court also found that allowing citizen suits for past violations would undermine EPA's enforcement discretion. *Gwaltney*, 484 U.S. at 60-61.

CBE appealed the judgment of the district court to the Seventh Circuit Court of Appeals, and on July 23, 1996, the Seventh Circuit reversed. The Seventh Circuit chose not to follow *United Musical* or *Gwaltney*. With respect to *United Musical*, the Seventh Circuit squarely disagreed. With respect to *Gwaltney*, the Seventh Circuit chose to focus on a difference in statutory wording to

conclude that Congress must have intended EPCRA citizen plaintiffs to sue for past violations: while the CWA authorizes citizens to sue a facility "alleged to be in violation" of its permit or other requirement, EPCRA authorizes citizens to sue "for failure to" comply with certain reporting requirements. Pet. App. A11.

The court also did not follow this Court's reasoning that one purpose of the 60-day notice period is to allow an alleged violator an opportunity to come into compliance, nor did it elect to examine Congress's reasons for establishing the notice period. *Id.* A13. The court apparently dismissed this Court's reasoning in *Gwaltney* on the sole ground that because Congress amended the Clean Air Act (CAA) in 1990 to permit citizen suits for some past violations, yet left the notice provision intact, Congress must have intended to remove the opportunity to come into compliance from all environmental statutes. *Id.* The Seventh Circuit also failed to recognize that citizens do not have Article III standing to sue for past violations, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Gwaltney*, 484 U.S. at 70 (Scalia, J., concurring), and that Congress modeled EPCRA's citizen suit provision after long-standing principles found in all environmental citizen suit provisions, and thus could not have intended to have EPCRA's provision operate differently from those of other, previously enacted, statutes.

SUMMARY OF ARGUMENT

This Court has previously found that one purpose of the 60-day environmental citizen notice period is to allow

an alleged violator an opportunity to come into compliance, thus rendering a citizen suit unnecessary. *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *Gwaltney*, 484 U.S. 49. EPCRA's notice provision is identical to those already examined by this Court, and should be accorded the same purpose. Interpreting the citizen suit provision as allowing an opportunity to cure promotes the purposes Congress intended it to serve and is fully supported by the legislative history of previously enacted statutes upon which EPCRA is modeled.

Congress intended citizen suits to be a limited supplement to government actions to secure compliance. EPCRA thus presupposes the existence of an ongoing violation before a citizen suit may be filed. Allowing citizens to seek penalties for past violations would also undermine EPA's enforcement discretion, a result this Court did not find warranted under the CWA.

Although EPCRA contains slightly different language from the CWA and other citizen suit provisions, Congress gave no indication that EPCRA should be treated any differently. In the absence of a contrary congressional intent, Congress should not be presumed to have made a substantial change from its customary citizen suit model. A statute conferring jurisdiction on the federal courts should also be strictly construed, and any doubts resolved against jurisdiction. Here there are serious doubts that Congress intended citizens to sue for past EPCRA violations, and all citizen plaintiffs can highlight is a slight difference in language and attempt to stretch that difference into federal jurisdiction.

To invoke the jurisdiction of the federal courts, a plaintiff also must satisfy the standing requirements of Article III of the Constitution. The constitutional limits on the exercise of federal jurisdiction are founded in concern about the properly limited role courts should play in a democratic society. This Court has therefore interpreted Article III's "case" or "controversy" clause to require a plaintiff to have a personal stake, and not a "generalized interest," in the outcome of a case.

Allowing a citizens group, like CBE, to seek penalties for wholly past EPCRA violations is an attack on this basic constitutional principle. The notion that CBE, at the time it filed its complaint, had an injury that could be redressed by its requested relief would open the federal courts to lawsuits this Court has found unwarranted. As it may not modify or abrogate the "irreducible constitutional minimum" of standing, Congress could not have intended to authorize citizen groups to sue for past EPCRA violations.

Ignoring congressional intent and permitting citizen suits for past EPCRA violations would expand the limited, supplemental role of citizen suits and flood the federal courts with an excessive number of citizen suits, a result Congress clearly sought to avoid. If citizen suits may be brought for purely past violations, all that a citizen plaintiff need do is examine EPCRA filings that were submitted after the annual filing dates and file suit seeking penalties of \$25,000 per day. Because EPCRA is a strict liability statute, any EPCRA reporting violation, even if cured, would support federal jurisdiction, and the citizen group would stand to recover its attorneys' fees in what was a lawsuit without any environmental purpose.

The goal of environmental compliance was achieved when The Steel Company, upon receiving CBE's notice, promptly filed its EPCRA forms. This is exactly what Congress intended in fashioning EPCRA's citizen suit provision. EPCRA's citizen enforcement scheme, like those of other environmental statutes, allows citizens to enforce only against those companies that are unable or unwilling to comply before suit is filed.

ARGUMENT

I. THIS COURT'S INTERPRETATION OF THE CITIZEN SUIT NOTICE PROVISION, EPCRA'S LANGUAGE, AND LEGISLATIVE HISTORY SHOW THAT CONGRESS DID NOT INTEND TO AUTHORIZE CITIZENS TO SUE FOR PAST VIOLATIONS

A. This Court Has Held That Congress Provided a Notice Period in Environmental Citizen Suits to Prompt Either Voluntary Compliance or Government Enforcement

Using the model it created in the CAA Amendments of 1970, Congress has included a citizen suit provision in every piece of federal environmental legislation except one.⁵ Consequently, the citizen suit provisions in federal environmental laws resemble each other almost completely. *See Hallstrom*, 493 U.S. at 22-23 & n. 1; Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 847-51 (1985).

⁵ The Federal Insecticide, Fungicide, and Rodenticide Act does not have a citizen suit provision. 7 U.S.C. §§ 136-136y.

Congress requires a would-be citizen suit plaintiff to provide "notice of the alleged violation" to EPA, the state in which the alleged violation "occurs," and the alleged violator at least 60 days before filing suit. *See, e.g.*, 33 U.S.C. § 1365(b)(1)(A) (CWA), 42 U.S.C. § 6972(b)(1)(A) (Resource Conservation and Recovery Act (RCRA)). Congress included an identical notice provision in EPCRA, which likewise requires a citizen to provide "notice of the alleged violation" to EPA, the state in which the alleged violation "occurs," and the alleged violator at least 60 days before filing suit. 42 U.S.C. § 11046(d)(1).

In addition to requiring the would-be plaintiff to wait until the notice period expires, Congress bars a citizen suit if the government has already brought an action to secure compliance. *See, e.g.*, 33 U.S.C. § 1365(b)(1)(B); 42 U.S.C. § 6972(b)(1)(B). Congress likewise included this restriction in EPCRA, prohibiting a citizen suit if the government has brought an action to enforce the requirement concerned. 42 U.S.C. § 11046(e).

The purpose of the citizen suit notice period is twofold: 1) it gives the alleged violator the opportunity to bring itself into compliance, thus rendering a citizen suit unnecessary; and 2) it also gives the government the opportunity to determine whether it should utilize its own considerable powers to enforce compliance, thus barring a citizen suit. *Hallstrom*, 493 U.S. at 29-31 (interpreting RCRA's notice provision); *Gwaltney*, 484 U.S. at 60-61 (1987) (CWA); *United Musical*, 61 F.3d at 475-78 (EPCRA). In *Gwaltney*, this Court examined for the first time the purposes of the notice provision. Justice Marshall, writing for a unanimous Court, explained:

If [EPA] or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary. It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes wholly gratuitous.

Gwaltney, 484 U.S. at 60.

The Court bolstered its conclusion by examining the legislative history behind environmental citizen suits. Members of Congress characterized the citizen suit provisions as "abatement" or "injunctive" measures, compelling the Court to conclude that Congress intended a citizen suit to proceed only if there is a continuing violation, and thus a violation to enjoin. *Id.* at 61-62. The Court also noted that the CWA's citizen suit provision was modeled after the CAA's provision which (at the time) was "wholly injunctive in nature." *Id.* at 62.⁶

In reiterating its *Gwaltney* reasoning two years later in a RCRA citizen suit, this Court again sought guidance from congressional intent and found that "the [CAA's]

⁶ In 1972, in passing the CWA's citizen suit provision, Congress added the penalty remedy, providing an extra incentive to industry to comply. Also, in 1990, Congress amended the CAA to add the penalty remedy. Pub. L. No. 101-549, 104 Stat. 2399, 2682 (codified at 42 U.S.C. § 7604(a)). Congress knows how to provide citizens with the enforcement tools it deems warranted.

legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29. As it had in *Gwaltney*, this Court acknowledged that Congress intended the notice period to stimulate an enforcement action by the government or compliance by the alleged violator, "thus obviating the need for citizen suits." *Id.*

The Seventh Circuit dismissed *Gwaltney* solely because three years after *Gwaltney* was decided, Congress amended the CAA "to permit citizen enforcement actions for past violations, yet left the notice provision intact." Pet. App. A13. This led the Seventh Circuit somehow to conclude that *Gwaltney's* reasoning that the notice provision operates as an opportunity to cure "is no longer as compelling as it was when *Gwaltney* was decided." *Id.* But the Seventh Circuit failed to recognize that Congress addressed its *Gwaltney* concerns with limitation. Under the amended CAA, a citizen may sue for past violations only "if there is evidence that the alleged violation has been repeated." 42 U.S.C. § 7604(a)(1).⁷ Somehow the Seventh Circuit discerned in this amendment a wholesale

⁷ Under this Court's Article III jurisprudence, as further explained below, this provision is unconstitutional if it does not require a continuing violation. In interpreting the amended CAA, one court has held that "courts will not allow citizens to file suits based on violations that have been corrected. The Clean Air Act citizen suit provision is not intended to be a windfall for plaintiffs. Rather it is intended to encourage and enforce compliance with environmental regulations." *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561, 1565 (N.D. Ga. 1994).

repudiation of *Gwaltney*, finding that the notice period no longer functions as an opportunity to cure, and applied that flawed reasoning to EPCRA, a statute Congress did not amend. Pet. App. A13.

The Sixth Circuit recognized this and reasoned that "by amending the Clean Air Act, but failing to amend EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time the suit is filed." *United Musical*, 61 F.3d at 477. By discussing *Gwaltney*, but by amending only in part the CAA, Congress noted its approval of one purpose of the notice provision: to allow the alleged violator to come into compliance.⁸

By providing notice, citizen groups such as CBE operate as facilitators of congressional intent that EPCRA reporting requirements be met. Filing a lawsuit, with its attendant costs for the parties and burdens on the judicial system, should be a last resort if quick corrective action does not follow or if government enforcement lags. The Steel Company's compliance makes CBE's action complete and allows CBE to move on with its goal of prompting (and where necessary enforcing) environmental compliance. See also *Hallstrom v. Tillamook County*, 844 F.2d 598, 600-01 (9th Cir. 1987) ("Litigation should be a

⁸ As noted above, Congress did amend EPCRA in 1990 (three years after *Gwaltney*) to expand its reporting requirements, 42 U.S.C. § 13106(a), but did not amend EPCRA's citizen suit provision. Had Congress wanted to specify that *Gwaltney's* holding did not govern EPCRA, it could have easily done so in 1990.

last resort only after other efforts have failed."), *aff'd*, 493 U.S. 20.

As further evidence that it knew what it was doing when it established citizen suits, this Court noted that Congress has eliminated the 60-day waiting period so that citizens may file suit immediately after providing notice in certain cases involving potential serious harm to health and the environment. *Hallstrom*, 493 U.S. at 30 (citing CAA and CWA, this Court noted that "Congress has addressed the dangers of delay in certain circumstances and made exceptions to the required notice periods accordingly.") For example, a citizen is authorized to sue immediately for violations of RCRA's hazardous waste regulations. 42 U.S.C. § 6972(b). Congress carved out this exception to the 60-day notice period because it "determined that with hazardous wastes the dangers of delay and the potential for greater damage to public health or the environment outweigh the justifications of the pre-suit delay periods." *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992).

A citizen also may sue immediately for violations of the CWA's national standards of performance. 33 U.S.C. § 1365(b). Congress believed that these standards, which are "designed to assure that new stationary sources of water pollution are designed, built, equipped, and operated to minimize the discharge of pollutants, [are] among the most significant in the legislation." S. Rep. No. 414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3723-24. Congress emphasized that "enforcement of these [standards] be immediate, that citizens should be unconstrained to bring these actions, and that the courts

should not hesitate to consider them." *Id.*, reprinted in 1972 U.S.C.C.A.N. at 3746. Congress also did away with the 60-day waiting period in actions addressing violations of the CAA's hazardous air pollutant requirements. 42 U.S.C. § 7604(b). Congress created this exception because it believed that emissions of hazardous air pollutants are "extremely hazardous to health" justifying immediate citizen action. See H.R. Rep. No. 1146, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 5356, 5365; *Adair v. Troy State Univ.*, 892 F. Supp. 1401, 1406-09 (M.D. Ala. 1995) (examining history of exception).

There may be other instances where one could argue that Congress should have provided immediate citizen access to the courts. In passing EPCRA, however, Congress did not choose this readily available option, and thus indicated that EPCRA's notice provision should not be treated differently from those of other environmental statutes. While Congress believed that the gathering and submission of information to the government and the public is important, Congress did not judge EPCRA's reporting requirements to be among those warranting citizen enforcement prior to an opportunity to remedy, and thus mandated a 60-day notice period with no exceptions.

B. The Seventh Circuit Elevated Citizen Plaintiffs to an Enforcement Level Equal to That of EPA, a Result Congress Clearly Did Not Intend

The Seventh Circuit failed to appreciate the crucial distinction between government and citizen enforcement

of EPCRA: Congress simply did not intend to provide citizens with the same enforcement authority it gave to the government. This Court recognized that allowing citizens to sue for past violations "would create a second and more disturbing anomaly. The bar on citizen suits when governmental enforcement action is underway suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 60. This Court expressed understandable concern that citizen suits based on past violations could hamper the government's enforcement discretion:

If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

Id. at 61.

A comparison of the citizen suit provisions of the CWA and EPCRA compels the conclusion that Congress, as under the CWA, did not intend to authorize citizen suits for past EPCRA violations. If an EPCRA citizen suit is filed, the federal courts have jurisdiction:

to enforce the requirement concerned *and* to impose any civil penalty provided for violation of that requirement.

42 U.S.C. § 11046(c) (emphasis added). The CWA's citizen suit provision likewise gives federal courts jurisdiction "to enforce such an effluent standard . . . and to apply any appropriate civil penalties. . . ." 33 U.S.C. § 1365(a)(2) (emphasis added). This Court in *Gwaltney* found this language compelling, and in holding that Congress did not intend to authorize citizen suits for past CWA violations, reasoned:

[CWA's citizen suit provision] does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referenced to in the same subsection, even in the same sentence. The citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement. A comparison of [the relevant CWA sections] thus supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit to enjoin or otherwise abate *an ongoing violation*.

Gwaltney, 484 U.S. at 58-59 (emphasis added).

As in the CWA, EPCRA's citizen suit provision does not authorize civil penalties separately from injunctive relief. In fashioning EPCRA's citizen suit provision, Congress intended to authorize a citizen to seek civil penalties only in a suit brought to enjoin an ongoing violation. Because there was no dispute that The Steel Company was in compliance with EPCRA before the 60-day notice period expired, the lower court correctly dismissed CBE's suit.

The Sixth Circuit was likewise influenced by the differences between citizen and EPA enforcement:

This difference between the grants of authority to the EPA and citizen plaintiffs is significant because it indicates a congressional intent to limit citizen suits to ongoing violations and to give EPA sole authority to seek penalties for historical violations. . . . Although civil penalties for purely historical violations may be appropriate in some cases, the congressional scheme leaves to the EPA, with its broad perspective on the entire spectrum of enforcement and compliance, discretion to determine those violators whose conduct warrants such penalties.

United Musical, 61 F.3d at 475, 477.⁹ Upon receiving CBE's notice letter, EPA learned that The Steel Company was a potential EPCRA violator, yet it elected not to pursue penalties. Nothing in EPCRA indicates that Congress intended private citizens like CBE to usurp EPA's discretion and pursue penalties on its behalf if the alleged violator has come into compliance. CBE has nothing to pursue, the "congressional goal has been achieved, and an enforcement suit is unnecessary." *Id.* at 477.

In *Gwaltney*, this Court also posed the hypothetical in which EPA issued a compliance order and agreed not to assess penalties "on the condition that the violator take some extreme corrective action" by installing expensive pollution control equipment. *Gwaltney*, 484 U.S. at 60-61.

⁹ EPA's "broad perspective" is important because EPA is equipped to fully appreciate whether a company otherwise compliant with environmental laws should be subject to the steep penalties that EPCRA provides. EPA does not seek penalties for every EPCRA violation.

The Court found that if a citizen could file suit months or years later to seek the penalties that EPA chose to forgo, EPA's enforcement discretion would be "curtailed considerably." *Id.* at 61. This likewise could occur under EPCRA. EPA recognizes that a party may install equipment or perform an environmentally beneficial project and pay either a reduced or no penalty. Section 312 Penalty Policy at 30 ("[T]he Agency has used its enforcement discretion to mitigate proposed penalties for some environmentally beneficial projects proposed and implemented by the respondent. In applying this penalty policy, this mitigation is completely discretionary."); Section 313 Penalty Policy at 19.

If the lower court is affirmed, however, citizens will be able to seek those penalties EPA chose to forgo. While EPCRA provides that a citizen suit is barred if EPA "has commenced and is diligently pursuing an administrative order or civil action," 42 U.S.C. § 11046(e), citizen groups, if authorized to sue for past violations, will be able to challenge any settlement arguing that the terms, especially EPA's penalty waiver, were too lenient and therefore not "diligently pursued."¹⁰

¹⁰ The United States filed an *amicus* brief and also argued in support of CBE's appeal to the Seventh Circuit. The government erroneously concluded that "the hypothetical articulated in *Gwaltney* could not occur under EPCRA." If the lower court is affirmed, nothing in EPCRA will prohibit a citizen group from paging through thousands of settlements, however old, and challenging those the group feels are too lenient. The government failed to appreciate the ramifications of its position that certainly could lead to litigation over past EPCRA violations that the settling parties, including EPA, never could have imagined would later be subject to challenge.

C. The Seventh Circuit Ignored the Similarities Between EPCRA and Other Environmental Citizen Suit Provisions

The Seventh Circuit erroneously concluded that EPCRA's citizen suit provision points to past violations. Pet. App. A11-A13. The court of appeals sought to distinguish *Gwaltney*, but its efforts to do so – particularly its side-by-side comparison of the language of EPCRA's and the CWA's citizen enforcement provisions – are unconvincing.

The court failed to acknowledge that Congress was not working off a blank slate when it drafted EPCRA's citizen suit provision. Using the model it created in 1970 under the CAA, Congress has inserted a citizen suit provision in almost 20 federal environmental statutes, including EPCRA. As noted above, like other environmental citizen suit provisions, *Hallstrom*, 493 U.S. at 22-23 & n.1, EPCRA requires a would-be citizen plaintiff to provide notice of the alleged violation. EPCRA likewise bars a citizen suit if the government elects to enforce. Further, EPCRA, like these other laws, provides for federal court jurisdiction without regard to the citizenship of parties or the amount in controversy, authorizes awards of attorneys' and expert witness fees, and allows intervention by the government and interested parties. EPCRA's provisions are thus nearly identical to that of other federal environmental citizen suit provisions.

Ignoring these similarities, the Seventh Circuit erred significantly in its interpretation of EPCRA's venue and

notice provisions. The court rightly noted that the use of the present tense in the CWA helped convince this Court that Congress did not intend to allow citizens to sue for past violations. Pet. App. A12-A13. However, the Seventh Circuit erroneously found that EPCRA must be different because "the enforcement provisions of EPCRA are not likewise cast in the present tense." *Id.* A13.

The Seventh Circuit first seized on EPCRA's venue provision, which provides that citizen suits "shall be brought in the district court for the district in which the violation occurred." *Id.* A13 (emphasis in original). But the Seventh Circuit ignored Congress's use of this exact language in the venue provisions of RCRA, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the Toxic Substances Control Act (TSCA),¹¹ and yet courts have uniformly held, relying on *Gwaltney*, that these statutes do not allow citizen suits for past violations. See, e.g., *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193 (6th Cir. 1995) (CERCLA citizen suit must allege continuing violation); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2nd Cir. 1993) (same for RCRA); *Moreco Energy, Inc. v. Penberthy-Houdaille*, 682 F. Supp. 931, 932 (N.D. Ill. 1988) (same for TSCA).¹² Moreover, the distinction relates only to venue, and not to the district court's jurisdiction.

¹¹ 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(b)(1); 15 U.S.C. § 2619(a).

¹² The CWA and CAA provide for suit in the district "in which such source is located," which is simply another way of phrasing "in which the violation occurred."

The Seventh Circuit next focused on the notice provision itself, which requires that the citizen send its notice to EPA, the alleged violator, and the state "in which the alleged violation occurs." Pet. App. A13 (emphasis in original). Again, the court ignored Congress's use of this exact language in every environmental citizen suit provision requiring notice to a state, including those that this Court found cannot support an action for past violations. Astonishingly, the court of appeals even went so far as to find that the word "occurs" is somehow not "cast in the present tense," *id.*, an obviously strained reading of the differences between the CWA and EPCRA, and an unfair parsing of language to reach a conclusion unsupported by this Court's previous holdings or the intent of Congress in establishing citizen suits.¹³

D. The Seventh Circuit Failed to Appreciate the Differences Between the Clean Water Act, Which Regulates Contamination, and EPCRA, Which Is Solely a Reporting Statute

In further explaining why it should not apply *Gwaltney*, the court below noted additional use of the present tense in the CWA. For example, the court noted that the CWA allows citizens to sue for violations "of a permit which is in effect" and also permits a state's

¹³ In *Gwaltney*, this Court likewise focused on the tense of the word "occurs." The Court noted that several provisions of the CWA are cast in the present tense, including the notice provision: "Citizen-plaintiffs must give notice to the alleged violator, the Administrator of EPA, and the State in which the alleged violation 'occurs.'" *Gwaltney*, 484 U.S. at 59 (quotation marks in original).

governor to sue if a violation "is occurring in another State and is causing an adverse effect on the public or welfare in his State." Pet. App. A12 (emphasis in original). The Seventh Circuit's analysis stopped there, however, and it failed to realize that Congress could not have used such language in EPCRA because: 1) EPCRA does not require permits; and 2) since EPCRA requires solely the filing of information, an EPCRA violation could not involve the migrating contamination regulated under the CWA as might affect another state. "EPCRA does not restrict the manufacturing, processing, use or disposal of any chemical; it is simply a reporting statute. . . ." *National Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1197 (D.C.C. 1996). The Seventh Circuit thus failed to comprehend the differences between EPCRA and the CWA, or that *Gwaltney* prohibits a citizen suit for a cured violation, but not for one that is continuing.

In further support of its decision not to apply *Gwaltney*, the Seventh Circuit emphasized that this Court relied on the CWA's definition of "citizen" to conclude that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." Pet. App. A12-A13. The court noted that the CWA defines "citizen" as a "person . . . having an interest which is or may be adversely affected." *Id.* A12 (emphasis in original). Because EPCRA does not contain a definition of "citizen," the court appeared to suggest that, unlike with the CWA, Congress could not have intended EPCRA citizen suits to have only prospective application. *Id.* A12-A13.

It is not surprising that Congress defined citizen as it did in the CWA. By authorizing any "citizen" as so defined to bring an action, Congress intended to codify

the grant of standing articulated by the Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972), which was decided only six months before the CWA was amended. See Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3823. As further explained below, that EPCRA authorizes "any person" to bring a citizen suit cannot alter Article III's requirement that citizen suits be prospective in nature because inherent in every citizen suit provision are the constitutional requirements that a plaintiff suffer a redressable injury.¹⁴ Consequently, the requirement that a person have standing, i.e., "an interest which is or may be adversely affected," necessarily underlies every citizen suit provision, including EPCRA's, even though EPCRA authorizes "any person" to sue. 42 U.S.C. § 11046(a).

The type of violation involved here – untimely reporting of information – also argues against authorizing citizen suits where a party has come into compliance. There is no basis to conclude that Congress intended to allow EPCRA citizen suits alleging past violations of a reporting requirement where other environmental statutes – those regulating discharges of pollutants into the environment – do not authorize citizen suits if the alleged violator has come into compliance. If any type of citizen suit for past violations is warranted, with the imposition of penalties and payment of a plaintiff's attorneys' fees, it

¹⁴ Only in the CWA did Congress use the term "citizen." Like EPCRA, the other major environmental statutes – Endangered Species Act, CAA, RCRA, CERCLA and TSCA – authorize "any person" to bring a citizen action. 16 U.S.C. § 1540(g); 42 U.S.C. § 7604(a); 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(a); 15 U.S.C. § 2619(a).

is for violations where direct harm to public health or the environment results, and not for reporting violations.

II. PRINCIPLES OF STATUTORY CONSTRUCTION COMPEL THE CONCLUSION THAT CONGRESS DID NOT INTEND TO AUTHORIZE CITIZEN SUITS FOR PAST EPCRA VIOLATIONS

The Seventh Circuit did not find that EPCRA unambiguously authorizes citizens to sue for past violations. Rather, it resorted to principles of statutory construction. Pet. App. A10 ("We examine the statute before us in light of criteria the *Gwaltney* Court used to analyze the citizen suit provisions of the Clean Water Act.")

But the Seventh Circuit's alacrity in finding congressional authorization of citizen suits for past violations runs counter to basic principles of statutory construction. This Court has long held that statutes conferring jurisdiction on federal courts are to be strictly construed, and any doubts resolved against federal jurisdiction. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) (federal courts should "scrupulously confine their own jurisdiction to the precise limits which [a federal statute] has defined."); *Healy v. Ratta*, 292 U.S. 263, 270 (1934). Also, legislation creating liability where none existed at common law should be construed most favorably to the person or entity subject to liability. *Lessee of Brewer v. Blougher*, 39 U.S. (14 Peters) 178, 185, 10 L. Ed. 408, 411 (1840); *Handy Bros. Body Shop, Inc. v. State Farm Mut. Auto. Ins. Co.*, 848 F. Supp. 1276, 1287 (S.D. Miss. 1994).

Further, in comparing the CWA's "to be in violation" to EPCRA's "failure to do," the Seventh Circuit found

that, "The language of EPCRA contains no temporal limitation; 'failure to do' something can indicate a failure past or present." Pet. App. A11. Although EPCRA's legislative history provides no guidance on the issue, it is logical that Congress used the "failure to . . . complete and submit" language, without indicating any intent to allow citizen suits for past violations. While citizens may enforce hundreds, or even thousands, of different requirements of the CWA, CAA and RCRA, for example, EPCRA citizen plaintiffs are authorized to file suit regarding only four reporting requirements. 42 U.S.C. § 11046(a)(1)(A)(i-iv). Congress was therefore able to easily enumerate the four citizen-enforceable requirements using "failure to . . . complete and submit," and it did not have to use the catch-all "to be in violation" language used in other statutes to identify the numerous requirements subject to citizen enforcement. *See, e.g.*, 33 U.S.C. § 1365(a)(1)(A) (under CWA, citizens can sue a facility "alleged to be in violation" of "an effluent standard or limitation . . . or order"; "effluent standard or limitation" has its own lengthy definition, 33 U.S.C. § 1365(f)). Because EPCRA is not a permitting scheme, unlike the CWA, CAA or RCRA, Congress used language that naturally accompanies reporting requirements – "failure to . . . complete and submit" certain forms – but did not use language that provided jurisdiction over past violations.

The Seventh Circuit also found that the "failure to complete and submit" forms "under" Sections 312 and 313 should be read to incorporate those sections' annual filing dates. Pet. App. A11-A12. The reference to complete and submit forms "under" Sections 312 and 313 is

simply that – a reference to Section 312's inventory form and Section 313's Form R – and not a wholesale incorporation of those sections' requirements. Had Congress intended EPCRA's citizen suit provision to operate differently from its model, it no doubt would have so indicated either in the statute or the legislative history. The Court should not assume that Congress meant to institute a substantive change without explanation.

The Sixth Circuit squarely addressed this language difference by first contrasting the language of Section 326(a) – “failure to . . . complete and submit” – with the requirement in Section 313:

Although § 11023(a) requires submission of Form Rs by a certain date, the citizen suit provision emphasizes the completing and submitting of the forms. This language suggests that only the failure to complete and submit the forms can provide the basis for a citizen suit. While among the provisions of § 11023(a) is the requirement that the form be filed by July 1 for the preceding calendar year, the citizen suit provision speaks only of the completion and filing of the form. The form is completed and filed even when it is not timely filed. . . . We see no basis upon which one must conclude that Congress, when contemplating citizen enforcement suits, intended such a late submission to be the equivalent of a complete failure to submit the information.

United Musical, 61 F.3d at 475. The Sixth Circuit then found that, although a few district courts have held that EPCRA authorizes citizen suits for past violations, the language of EPCRA argues against allowing such suits, and it rejected “this rather hypertechnical parsing of the

language of the statutes in favor of the most natural reading of EPCRA, which weighs against allowing citizen suits for purely historical violations.” *Id.* at 476-77.¹⁵ Congress thus preserved its customary prospective implication of environmental citizen suits in EPCRA and limited citizen actions to instances of uncorrected past violations “by emphasizing that it is the failure to submit the requisite forms that gives rise to a citizen action.” *Id.* at 475. Consequently, when CBE filed suit, The Steel Company had no longer “failed” to complete and submit the required forms, and the district court correctly dismissed CBE's suit.

This Court has held that, “In the absence of indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.” *Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 15 (1981) (rejecting claim that the CWA provided an implied remedy for damages). EPCRA's legislative history reveals no intent to allow citizen suits for past violations. An examination of the legislative history of the provisions upon which EPCRA is based also shows that Congress did not want to

¹⁵ It could also be argued that an EPCRA citizen suit is proper only where the alleged violator knew of the requirement and yet failed to comply, for example, after receiving CBE's notice letter and either ignoring it or failing to take the significant effort to comply within the 60-day period. A common definition of “fail” is “Fault, negligence, or refusal.” *Black's Law Dictionary* 534 (5th Ed. 1979). One cannot refuse to complete and submit forms if one is uninformed of the requirement.

overburden federal courts with citizen actions if compliance could be achieved during the notice period. *Hallstrom*, 493 U.S. at 28-29. Had Congress thought a citizen remedy for past EPCRA violations appropriate, it could have fashioned such a remedy. This Court should not find an implied one.

Numerous reporting deadlines exist under other environmental statutes, and, if a party receives a citizen notice regarding a failure to report and then complies within the 60-day notice period, there is no citizen suit under the direction of this Court in *Gwaltney*. It does not make sense that Congress, without explicitly mandating such a result, would authorize citizens to sue for past EPCRA reporting violations but not for past violations under other statutes. One absurd result of the Seventh Circuit's decision is that if a facility does not immediately report a release of chemicals into the environment, but does so upon receiving a notice letter, a citizen plaintiff could still sue under EPCRA, but not under CERCLA. See 42 U.S.C. § 11004(a)(1 & 3), § 11046(a)(1)(A)(i) (certain releases require reporting under both EPCRA and CERCLA).

III. CBE LACKS ARTICLE III STANDING TO SUE FOR PAST EPCRA VIOLATIONS

Congress could not have intended to authorize citizens to sue for past EPCRA violations because Congress may not confer standing to sue where the case or controversy requirement of Article III of the Constitution is not met. *Defenders of Wildlife*, 504 U.S. at 560; *Valley Forge Christian College v. Americans United for Separation of*

Church and State, 454 U.S. 464, 474-75 (1982); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy Article III's case or controversy requirement, which is the "irreducible constitutional minimum" of standing, a plaintiff must show that it has suffered an injury-in-fact, that the injury is fairly traceable to the defendant's actions, and that the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 65 U.S.L.W. 4201, 4203 (March 19, 1997); *Defenders of Wildlife*, 504 U.S. at 560-61. These constitutional limits on the exercise of federal jurisdiction are "founded in concern about the proper - and properly limited - role of the courts in a democratic society." *Warth*, 422 U.S. at 498. "The province of the court is, solely, to decide on the rights of individuals," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), and not to vindicate the general public interest that the government enforce the laws and that individuals and businesses comply with those laws. See *Defenders of Wildlife*, 504 U.S. at 576.

Article III thus requires that, to invoke the jurisdiction of the federal courts, a plaintiff must "stand to profit in some personal interest." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976). In this case, however, by seeking judicial authority that it may sue for past violations, CBE attempts to pursue a generalized public interest; it has no personal stake in the resolution of its complaint, and thus no Article III standing. The federal courts must reject "appeals to their authority which would convert the judicial process into no more than a vehicle for the vindication of value interests of concerned bystanders." *Valley Forge*, 454 U.S. at 473.

A. CBE Cannot Establish an Injury-in-Fact Because The Steel Company Was in Compliance with EPCRA When CBE Filed Its Complaint

CBE cannot establish an Article III injury. In its complaint, CBE did not (and could not) allege that The Steel Company was in violation of EPCRA, only that The Steel Company had in the past not filed certain EPCRA reports. CBE therefore did not seek injunctive relief ordering The Steel Company to come into compliance, but rather sought reimbursement of its attorneys' fees and civil penalties to be paid to the U.S. Treasury. J.A. 11; Pet. App. A25-A26.

In environmental citizen suits, the plaintiff is seeking redress of public rights and does not receive any personal damages (all penalties going to the U.S. Treasury). See *National Sea Clammers Ass'n*, 453 U.S. at 17 (citizen suit plaintiffs seek to enforce environmental requirements as private attorneys general, whose injuries are "non-economic and probably noncompensable.") When The Steel Company filed its reports, CBE's claim of personal injury was cured, and it joined the public at large in having an interest that the Executive take action against any party that has committed past EPCRA violations. See *Sosna v. Iowa*, 419 U.S. 393, 402 (1974) (plaintiff's injury must exist at time complaint is filed); *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (fact of past injury, while presumably affording plaintiff standing to claim damages, does not establish real threat that plaintiff would again suffer similar injury in future to support Article III standing).

B. Payment of Penalties to the U.S. Treasury or an Award of CBE's Fees Does Not Satisfy Article III's Redressability Requirement

CBE cannot show an injury, but even if it could, CBE certainly cannot demonstrate redressability. CBE requested the district court to redress its alleged injury as follows: 1) issue a declaratory judgment that The Steel Company had violated EPCRA; 2) authorize CBE to inspect The Steel Company's facility and records for compliance with EPCRA for at least one year; 3) order The Steel Company to provide CBE a copy of all future EPCRA reports for at least one year; 4) order The Steel Company to pay civil penalties of \$25,000 per day for each day of each violation; and 5) award CBE its costs of litigation, including attorneys' fees. J.A. 11.

That a court may impose penalties payable to the U.S. Treasury or issue a declaratory judgment that a defendant violated EPCRA before the complaint was filed does not give a citizen plaintiff a sufficient stake in a case for Article III purposes. By seeking penalties and a declaratory judgment, CBE was not acting on its own behalf, but instead on behalf of the government and the public at large. See *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (private parties have no judicially cognizable interest in the prosecution of another); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (private parties have no judicially cognizable interest in procuring the enforcement of law by an administrative agency). Because it is undisputed that The Steel Company was in compliance before this suit was filed, CBE's only interest was that The Steel Company be called upon to answer for any past violations by paying penalties. Such an interest is no more

than the "undifferentiated public interest" in the "faithful execution" of the country's laws, and is insufficient to confer standing on the citizen plaintiff. *Defenders of Wildlife*, 504 U.S. at 577; *Gwaltney*, 484 U.S. at 70 (Scalia, J., concurring) ("If it is undisputed that the defendant was in a state of compliance when this suit was filed, the plaintiffs would have been suffering no remediable injury in fact that could support suit.") Just as the payment of penalties does not confer standing, this Court has likewise held that awarding attorney's fees does not constitute sufficient interest in a case for Article III purposes. *Lewis Continental Bank v. Lewis*, 494 U.S. 472, 480 (1990); *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986).¹⁶

Not only does The Steel Company maintain that CBE has no standing, but the United States also agrees that a past violation cannot confer standing on an environmental citizen suit plaintiff:

A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability. However, a citizen who brings suit simply to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to meet Article III's requirements; the mere assessment of civil penalties, which are payable only to the

¹⁶ CBE's other requested relief - that it be authorized to inspect The Steel Company's facility and records and be provided its future EPCRA reports - also amount to no more than a generalized interest in a company's compliance with the law.

Treasury, would not redress in any meaningful sense the citizen's alleged injuries. Indeed, if Congress were to give private citizens untrammelled authority to seek penalties for wholly past violations - oblivious to Article III's requirement that a litigant have a personal stake in the controversy - it would intrude upon the Executive's responsibility to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, § 3) and the prosecutorial discretion inherent therein.¹⁷

The government was rightly concerned by the expansion of citizen suit authority advanced by citizen groups. Citizen suit provisions essentially vest prosecutorial authority in persons who, unlike federal or state authorities, are not limited by constitutional constraints on government and are not accountable to the electorate. As noted in *Gwaltney*, allowing citizens to sue for past violations would also impermissibly intrude upon EPA's enforcement discretion.

That EPCRA authorizes "any person" to bring a citizen suit does not alter the requirement that citizen suits be prospective in nature because inherent in every congressional grant of standing are the constitutional

¹⁷ Brief of the United States as Amicus Curiae Supporting Affirmance at 21 n. 34, *Gwaltney*, 484 U.S. 49 (1987) (citation omitted). The United States urged affirmance arguing that respondents had properly alleged that *Gwaltney* was in violation of its discharge permit, but rightly noted that there is no standing if the violation is entirely past. In the present case, the United States filed an amicus brief and argued to the Seventh Circuit that EPCRA citizen suits would not interfere with EPA's enforcement discretion, but it did not address the threshold issue of whether Respondent has standing.

requirements that a plaintiff suffer a concrete injury and that the injury be redressable by a favorable decision. *See, e.g., Defenders of Wildlife*, 504 U.S. at 560-61. This constitutional core of standing is a minimum requirement which Congress cannot eliminate. *See, e.g., Warth v. Seldin*, 422 U.S. at 498-501. Congress simply cannot create standing by authorizing "any person" to bring an EPCRA action.

That *Defenders of Wildlife* involved a government defendant also does not matter for Article III purposes because a defendant's identity cannot alter Article III's requirements of injury and redressability:

As government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . . In exercising this power, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Defenders of Wildlife, 504 U.S. at 580 (citations omitted) (Kennedy, J., concurring). If a statute purports to give standing to "any person," without more, this requirement is not met. A would-be citizen plaintiff must establish an injury and redressability, and not merely point to a general congressional statement of standing. *Id.* at 580-81.

Three courts have held, all without analysis, that relief available to EPCRA citizen plaintiffs establishes redressability. *Don't Waste Arizona v. McLane Foods, Inc.*, 950 F. Supp. 972, 980 (D. Ariz. 1996); *Atlantic States Legal*

Found., Inc. v. Buffalo Envelope Co., 823 F. Supp. 1065, 1071 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1140-41 (E.D. Pa. 1993). These courts cursorily reasoned that because a court can impose penalties payable to the Treasury, issue a declaratory judgment that a party has violated EPCRA, enjoin future EPCRA violations, or award costs of litigation, Article III redressability was satisfied. These courts' shallow analysis, bereft of any constitutional examination, begs the ultimate question: just how do these types of relief, which either do not benefit the EPCRA plaintiff or are simply a by-product of the litigation, satisfy Article III? This Court's Article III jurisprudence shows that they do not.

"Surely Congress did not intend this [citizen suit] provision to be read in a vacuum, without regard to constitutional limitations." *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1045 (8th Cir. 1988) (Bowman, J., dissenting), *rev'd sub nom. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Because Congress alone cannot expand the constitutional jurisdiction of the federal courts, which would amount to amending the Constitution through legislation, it could not have intended to authorize citizens to seek penalties for past EPCRA violations.¹⁸ CBE has no standing to sue.

¹⁸ In the CAA Amendments of 1990, Congress revised the authorization for citizen suits under that statute. Pub. L. No. 101-549, 104 Stat. 2399, 2682, codified at 42 U.S.C. § 7604(a)(1) (citizen plaintiffs may sue "if there is evidence that the alleged violation has been repeated.") In his Signing Statement, President Bush noted that, "As the Constitution requires, litigants must show, at a minimum, intermittent, rather than

IV. COMPLYING WITH EPCRA TAKES MUCH MORE THAN A "MINIMAL EFFORT"

The court below latched onto two other reasons to conclude that citizens should be allowed to sue for past violations. First, the Seventh Circuit concluded that if the Sixth Circuit in *United Musical* were correct, "citizen suits could only proceed when a violator receives notice of intent to sue and still fails to spend the minimal effort required to fill out the forms and send them in." Pet. App. A14. The Seventh Circuit reasoned therefore that citizens would have no reason "to incur the costs of learning about EPCRA." *Id.*

Contrary to the court's assertion, completion of EPCRA forms is no simple matter. It is also a more laborious matter for those companies, especially small businesses like The Steel Company, that cannot assign personnel to deal solely with environmental compliance. Completing the forms, especially the Section 313 Form R, requires the collection and computation of detailed information regarding a company's operations and practices. EPA itself estimates the public reporting burden for Section 313 familiarization, compliance determination, calculation, completion and recordkeeping to be 124.5 hours in the first year, 61 Fed. Reg. 33588, 33617 (June 27, 1996), or over three working weeks for a single employee, not

purely past, violations of the statute in order to bring suit." Reprinted in 1990 U.S.C.C.A.N. 3887-1, 3887-2. Interpretation of the CAA is obviously not before the Court. However, one point is clear: Congress did not amend EPCRA when it amended the CAA.

considering that employee's other duties, including compliance with other environmental laws, hardly a simple matter.

The completion of Section 312 forms also requires collection and recording of detailed information. The reporting of chemical mixtures may further complicate reporting.¹⁹ See 40 C.F.R. § 370.40-41 (if a chemical is part of a mixture, a party may report "either the weight of the entire mixture or only the portion that is a particular hazardous chemical. . . .") EPA admits that even its rule explaining how to calculate chemical mixtures under Section 312 "may have confused the regulated community. . . ." *Confusion About EPCRA Rule Acknowledged*, Chem. Reg. Rep. (BNA), Aug. 17, 1990, at 802. EPA estimates that there are over 500,000 chemicals or products which are subject to the Section 312 reporting requirements. *Title III List of Lists: Consolidated List of Chemicals Subject to EPCRA*, EPA, June 1994, at 1 n. 1. And EPA attributes many EPCRA compliance problems to "gray areas in the law" that make reporting requirements confusing for both EPA and industry. *EPA Eyes Changes to EPCRA Regulations to Clarify 'Gray Areas,' Increase Compliance*, Toxics Law Rep. (BNA), March 9, 1994, at 1132.

Because of EPCRA's complexity, companies that receive an EPCRA notice letter may not be able to easily comply and submit the required forms within the 60-day notice period. To those companies, including The Steel Company, whose regulatory burden is great and whose

¹⁹ EPA has not provided the regulated community with an estimate of the public reporting burden for Section 312 compliance.

resolve to cure a violation is strong, Congress offers an opportunity to come into compliance during the 60-day period, thus avoiding a citizen suit and leaving to EPA's "broad perspective" whether enforcement is truly necessary. This makes EPCRA no different from other environmental statutes where, if a violation is cured within 60 days, citizen enforcement is barred.

Moreover, should a company simply "throw" reports together after receiving a citizen notice of intent to sue, it opens itself up to a wide range of civil and criminal penalties. First, EPA considers the submission of incomplete forms to be serious violations, which can result in penalties as high as \$16,500 per day. Section 312 Policy at 15-20; Section 313 Policy at 11-12. Moreover, in addition to running the risk of civil penalties for filing incomplete forms, a company also runs the risk of criminal prosecution for submitting false information. 18 U.S.C. § 1001; Section 313 Policy at 7; *see also United States v. Murphy*, 935 F.2d 899, 900 (7th Cir. 1991) (18 U.S.C. § 1001 makes it a criminal offense to submit false information required by a federal statute to a state agency; thus, a party that submits false Section 312 forms to state or local agencies could be prosecuted under 18 U.S.C. § 1001.)

Second, the court below ignored the traditional operation of environmental citizen suit provisions and instead chose to guarantee EPCRA citizen plaintiffs recovery of their costs and attorneys' fees. EPCRA is no different, however, from other environmental statutes in that Congress did not guarantee citizens recovery of their costs of identifying alleged violators. A citizen group always faces the possibility that a party will be able to cure the alleged violation before the group files suit, the result

that Congress no doubt sought as the citizen group's primary goal, not the advancement of litigation. Likewise, if the government pursues a violator before the notice period expires, the citizen plaintiff is barred from suing and thus cannot recover its costs. Affirming the Seventh Circuit's decision would guarantee EPCRA plaintiffs the possibility of recovering their costs in any EPCRA suit, however trivial, a result that Congress could not have intended. The goal of the citizen group is achieved with compliance, even though at a small cost for posting the notice.

V. NOTHING INDICATES THAT CONGRESS INTENDED CITIZENS TO HAVE UNBRIDLED DISCRETION TO DETERMINE WHEN TO BRING ACTIONS FOR CURED PAST VIOLATIONS

Because reporting, rather than substantive, violations are the easiest to prove, citizen groups readily file suits alleging this kind of violation. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tulane L. Rev. 339, 365-66 (1990). Some observers have found that, "Enforcement proceedings brought for violations of the voluminous paperwork requirements of the Clean Water Act generate tens of thousands of dollars in attorneys' fees but no discernible environmental benefits." *Id.* at 366. This lack of environmental benefit is even more pronounced under EPCRA because EPCRA does not restrict the use or disposal of any substance; it is simply a reporting statute.

Even enforcement attorneys at EPA find that filing EPCRA citizen suits is "a rewarding and lucrative practice area for private attorneys general. . . . The large number of EPCRA citizens suits may be because paperwork violations are relatively easy to prove when compared to other more substantive violations, and because EPCRA is a strict liability statute." Michael J. Walker & Jon D. Jacobs, *EPCRA Citizens Suits: An Evolving Opus with a Discordant Note*, *The Journal of Environmental Law & Practice*, Jan./Feb. 1997, at 20.²⁰ The authors explain why EPCRA litigation has been such a fertile ground for citizen groups:

[C]itizen suits were first used extensively under the CWA. This probably would not have been the case had EPCRA also been in existence at that time, because EPCRA is much simpler to use from a litigation point of view. The statute is well written; the issues are generally clear-cut; the suits are inexpensive, require minimal expert testimony, and usually can be resolved on a summary determination without the need for a trial or evidentiary hearing.

Id. at 14.

If the Seventh Circuit is affirmed, the federal courts will experience a deluge of EPCRA citizen suits, contrary

²⁰ Mr. Walker is the Senior Enforcement Counsel for Administrative Litigation in EPA's Office of Enforcement and Compliance Assurance. Mr. Jacobs is a Branch Chief in EPA's Office of Enforcement and Compliance Assurance's Toxic and Pesticides Enforcement Division. The authors note that the opinions in their article are personal views and not necessarily those of EPA.

to Congress's concern that the federal courts not be flooded with unnecessary citizen actions. Not only will citizen groups be able to sue if a company, like Petitioner, achieves compliance within the notice period, but a citizen group will also be able to search old government records to determine which companies filed late EPCRA reports and then sue. Consider the situation of a small manufacturer, in compliance with numerous environmental, health and safety requirements, but not in compliance with EPCRA because it is uninformed about EPCRA. The company then discovers it is subject to EPCRA and submits the required reports. A year or two later, in searching government records, a citizen group finds the company's EPCRA filings and sends an EPCRA notice. If the company does not settle on the terms demanded by the citizen group, it must defend a lawsuit in federal court. Moreover, if suit is filed, the citizen group is certain to prove liability. Like other environmental statutes, EPCRA is a strict liability statute, and, under the decision below, an EPCRA reporting violation, even if cured, is always sufficient to allow the citizen to sue in federal court. The citizens group has an ironclad lawsuit and will seek to recover its fees as the "prevailing party." 42 U.S.C. § 11046(f).

Congress could not have intended to permit citizen groups to exhume past violations and then bring penalty actions based on those violations. Yet citizen groups will have that authority if the Seventh Circuit is affirmed. Such actions do not abate any violation, the violation already having been corrected. Nothing is gained by such a suit (with the exception of the citizen group possibly recovering attorneys' fees). A party's resources will be

consumed defending an unnecessary lawsuit – resources that could be used to invest in new plant and equipment, creating jobs and benefiting the community.

Citizen groups therefore have seized upon EPCRA as a fail-safe, guaranteed funding mechanism. One such group, Don't Waste Arizona, has sent over 90 EPCRA notices to companies in Arizona since 1992, filed at least 12 complaints in federal court, settled with several companies before filing suit, and has yet to resolve its disputes with another 40.²¹ *Nonprofit Cashing in on Lawsuits*, The Business Journal-Phoenix, June 21, 1996, at 1, 38. Because proving EPCRA violations is no difficult task, the head of Don't Waste Arizona:

has latched onto another strategy to pay his bills: He sues unsuspecting small businesses and forces them to meet stringent Environmental Protection Agency guidelines that most didn't even know existed. . . .

Id. at 38.

Given the prospect of potentially ruinous penalties for what is an easily-proved strict liability offense, in addition to a possible award of a plaintiff's attorney's fees, business entities invariably find themselves compelled to yield to the citizen group's demands. The judicial extension of citizen suit jurisdiction to past violations makes this practice so lucrative because there is nothing a defendant, having already achieved compliance, can do to defeat the plaintiff's action. Citizen groups thus have

²¹ Don't Waste Arizona is one of the ten citizen groups that joined in an *amicus* brief in support of CBE's appeal to the Seventh Circuit.

enormous leverage, with little to lose and much to gain, simply by reviewing government records to determine which companies are easy litigation targets.

Protection of health and the environment through strong public and private commitments is today part of the accepted and essential goals of government, business and the public. The vitality and success of environmental protection benefit all people, but a balanced and reasonable response to those who strive to comply with the numerous and complex regulatory requirements should not be lost in the zeal to enforce those requirements. The Steel Company, like most U.S. business, seeks to comply with the law and does so. When it received notice of EPCRA violations, it quickly responded within the statutory notice period for cure. To insist that its response fell short, and that citizens can sue for wholly past violations, disserves the spirit whereby the regulated community today seeks to be a partner, not a recalcitrant, in the successes of environmental protection. Citizen enforcement, while important, should not be accorded greater significance than intended by Congress.



CONCLUSION

The judgment of the Seventh Circuit Court of Appeals should be reversed, and the District Court's dismissal of CBE's complaint should be reinstated and affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
vs. *Petitioner,*
CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. §§ 11001 et seq., requires large industrial facilities to file annual reports providing details about their use and release of toxic chemicals. The questions presented are:

1. Whether EPCRA authorizes a citizen suit against a party who failed to file the required reports for several years, then filed out-of-time reports only after receiving notice of the plaintiff's intent to sue but before the suit was brought.

2. Whether Article III bars Congress from permitting a citizen suit in such circumstances by plaintiffs who live near and are affected by the facility, and who expended resources to obtain independently the information that should have been supplied in the reports.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-643

**THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,**
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent,

**On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit**

BRIEF FOR THE RESPONDENT

STATEMENT

A. The Emergency Planning and Community Right-to-Know Act

1. The Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §§ 11001 et seq., is widely regarded as one of the nation's most successful environmental statutes.¹ Unlike many environmental statutes, EPCRA does not impose "command-and-control" obligations on firms in an effort to compel pollution reductions through technological requirements or uniform emissions limitations. Instead, EPCRA is purely an informational statute. "The underlying premise of EPCRA is that the public has a right to know

¹ See, e.g., Hearne, *Tracking Toxics: Chemical Use and the Public's "Right-to-Know,"* 38 *Environment* 4,4 (1996) ("Industry, government, and community representatives alike consider" the central disclosure provision of EPCRA to be "one of the most successful environmental laws in U.S. history."); Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, 11 *J. Land Use & Env. L.* 217 (1996); R. Percival et al., *Environmental Law and Policy* 650-53 (2d ed. 1996); P. Menell and R. Stewart, *Environmental Law and Policy* 424 (2d ed. 1992); Pildes & Sunstein, *Reinventing the Regulatory State*, 62 *U. Chi. L. Rev.* 1, 106 (1995). Indeed, even petitioner acknowledges that EPCRA has proved effective. Pet. Br. 6.

about the toxic chemicals released by facilities in their communities.”² EPCRA seeks to achieve its environmental goals not through regulatory mandates but through the disclosure of polluting activity.³

Section 312 of EPCRA, 42 U.S.C. § 11022, imposes inventory requirements. Specifically, facilities using threshold amounts of certain specified toxic chemicals must submit, by March 1 of each year, an inventory of those chemicals to the local fire department and to state and local emergency planning commissions. The report must identify the chemicals on the site, the amounts used during the previous year, and the location of the chemicals on the site.

Section 313 of EPCRA, 42 U.S.C. § 11023, principally concerns releases of toxic chemicals. It provides that manufacturing facilities using threshold amounts of toxic chemicals must, by July 1 of each year, submit a form reporting any releases of those chemicals to the Administrator of the Environmental Protection Agency (EPA) and to a designated state official. These reports must include the volume of chemicals released, how releases in one year compare to the amounts released in previous years, projections of future releases, and recycling efforts.

All these reports must be made available for inspection by members of the public, and EPCRA requires local emergency planning agencies to notify members of the public that these reports are available by “publish[ing] a notice in local newspapers” (42 U.S.C. § 11044(b)). Section 313 specifically states that “the release forms required under this section are intended to provide information” not only “to Federal, State, and local governments” but to “the public, including citizens of communities surrounding covered facilities.” 42 U.S.C. § 11023(h). Members of the public use this information to help formulate local emergency response plans (42 U.S.C. § 11001(c)). In addition, Section 313 requires the Administrator “to

² General Accounting Office, *Toxic Chemicals: EPA's Toxic Release Inventory Is Useful but Can Be Improved* 32 (June 1991) [hereinafter GAO Report].

³ Some have discerned a general trend in environmental regulation away from command and control regulation and toward laws like EPCRA. See, e.g., R. Percival et al., *Environmental Law & Policy* 636-54, 825-834; P. Menell and R. Stewart, *Environmental Law and Policy* 415-27.

establish and maintain in a computer data base a national toxic chemical inventory based on data submitted to the Administrator under this section.” 42 U.S.C. § 11023(j). The Administrator must “make these data accessible by computer telecommunication and any other means to any person.” *Ibid.*

The toxic releases inventory has been widely used, and it is credited with significantly reducing the amount of pollution. See, e.g., GAO Report at 23-24. The overall effects of EPCRA have been dramatic: Reported releases of toxic chemicals by firms complying with EPCRA have been reduced nearly 46 percent since 1988.⁴

2. The success of EPCRA depends entirely on timely and accurate reporting, and as with any self-reporting scheme, the rate of compliance is a concern under EPCRA. The Act specifies that “[a]ny person * * * who violates any requirement of section [312 or 313] * * * shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation.” 42 U.S.C. § 11045(c)(1). But according to some estimates, over 30% of the facilities that should have submitted reports under EPCRA have not done so, partly because of the limitations of government enforcement efforts. GAO Report at 49. The EPA, for example, which is the federal agency charged with enforcement of EPCRA, not only has limited resources but has enforcement responsibilities under many other important environmental statutes. In response to these concerns, Congress included a citizen suit provision in EPCRA. See, e.g., 131 Cong. Rec. 34650 (Dec. 5, 1985) (statement of Rep. Glickman) (“In view of the government’s limited and overburdened enforcement authority, citizen suits are essential to assure compliance with the law.”); H.R. Rep. 253, 99th Cong., 1st Sess., pt. 5, at 83 (Nov. 12, 1985).

Section 326 of EPCRA, the citizen suit provision, states that “any person may commence a civil action on his own behalf against * * * [a]n owner or operator of a facility for failure to * * * [s]ubmit an

⁴ Environmental Protection Agency, 1995 Toxics Release Inventory Public Data Release (May, 1997). This document is available at <http://www.epa.gov/opptintr/tri/pdr95/drover01.htm>.

inventory form under section [312]" or "for failure to * * * [s]ubmit a toxic chemical release form under section [313]." 42 U.S.C. § 11046 (a)(1)(A)(iii) and (iv). Section 326 provides that, before suing, a plaintiff must give 60 days' "notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator" (42 U.S.C. § 11046(d)(1)). No citizen suit may be brought "if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act with respect to the violation of the requirement" (42 U.S.C. § 11046(e)). If the plaintiff prevails in a citizen suit, the court may "enforce the requirement concerned and * * * impose any civil penalty provided for violation of that requirement." 42 U.S.C. § 11046(c). The court may also award "costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." 42 U.S.C. § 11046(f).

B. The Proceedings Below

Petitioner operates a manufacturing plant on the Southeast Side of Chicago, Illinois. As part of its operations, petitioner removes rust from steel coils, a process called steel pickling. This process involves the use of hydrochloric acid, an extremely hazardous toxic chemical. 40 C.F.R. Part 355, App. A & B. Users of hydrochloric acid are subject to the reporting requirements of Sections 312 and 313 of EPCRA. Petitioner had on its premises other hazardous substances covered by Section 312 as well. J.A. 6-7; Pet. App. A7-A8; Pet. Br. 4.

Between 1988 and 1995, petitioner, by its own admission, did not file the reports required by Sections 312 and 313 of EPCRA. Pet. App. A8; see J.A. 7-10. During that period, petitioner not only had toxic chemicals on its premises but released literally tons of such chemicals into the environment. In one year, for example, it released 130,618 pounds of hydrochloric acid into the air.⁵

⁵ See The Steel Company's Reply Memorandum in Support of Its Motion to Dismiss, No. 95 C 4534 (N.D. Ill.), filed Oct. 19, 1995, Exh. B.

Respondent Citizens for a Better Environment (CBE) is a not-for-profit corporation with offices in Illinois, Minnesota, and Wisconsin. It has approximately 30,000 members, many of whom live in the Chicago area. J.A. 4. The complaint describes CBE's membership as follows (J.A. 5):

Members of CBE reside, own property, engage in recreational activities, breathe the air, and/or use areas near [petitioner's] facility. * * * CBE's members seek, acquire, and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work, and visit.

On March 16, 1995, CBE gave notice to petitioner and to state and federal authorities that it believed petitioner had violated Sections 312 and 313 of EPCRA and that it intended to bring suit. J.A. 13-16. This notice was the product of an investigation of petitioner prompted by, among other things, a report from a member of the public that petitioner released "acidic material" through its smokestacks "only at night."⁶ After petitioner received CBE's notice it filed overdue forms with the appropriate agencies. Pet. App. A8. The EPA did not institute proceedings against petitioner, and on August 7, 1995, CBE filed this citizen suit under Section 326 of EPCRA in the United States District Court for the Northern District of Illinois. CBE sought, among other things, a declaratory judgment that petitioner had violated Sections 312 and 313; civil penalties, as provided by Sections 325 and 326; an injunction authorizing CBE to inspect petitioner's facility and records to ensure compliance with EPCRA; and an award of all costs incurred in connection with the investigation and prosecution of the case. J.A. 11.

Petitioner moved to dismiss the complaint on the ground that "CBE cannot sue it for failure to file timely EPCRA reports in the past, but only may sue to force [petitioner] actually to complete and submit

⁶ See Plaintiff's Memorandum in Opposition to "Motion to Dismiss," No. 95 C 4534 (N.D. Ill.), filed Oct. 5, 1995, Exh. 1 (Affidavit of Stefan A. Noe).

any EPCRA reports from 1988 to 1995 that it may have failed to file." Pet. App. A21. The district court agreed with petitioner and dismissed the complaint. Pet. App. A17-A26. The district court acknowledged that numerous decisions of lower courts had rejected petitioner's interpretation of EPCRA. Pet. App. A21-22, citing *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 751-53 (W.D.N.Y. 1991); *Williams v. Leybold Technologies, Inc.*, 784 F. Supp. 765, 768 (N.D. Cal. 1992); *Delaware Valley Toxics Coalition v. Kurz-Hastings*, 813 F.Supp. 1132, 1141 (E.D. Pa. 1993). See also *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972 (D. Ariz. 1996); *Idaho Sporting Congress v. Computrol*, 952 F. Supp. 690 (D. Id. 1996); *Neighbors for a Toxic Free Community v. Vulcan Materials Co.*, 1997 U.S. Dist. LEXIS 7025 (No. 95-D-2617) (D. Colo. April 25, 1997). But the district court chose instead to rely on the single lower court decision that had accepted petitioner's interpretation, *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995).

The court of appeals reversed. Pet. App. A1-A15. The court relied on the plain language of Section 326, the citizen suit provision of EPCRA. Section 326 provides that a citizen suit may be brought "for failure to * * * [c]omplete and submit an inventory form under section [312]" and "for failure to * * * [c]omplete and submit a toxic chemical release form under section [313]." The court explained that "[t]he most natural reading of 'under' a section is 'in accordance with the requirements of' that section." Pet. App. A11. While petitioner had, by the time suit was brought, belatedly filed the forms, petitioner had failed to file the forms by the deadlines specified in Sections 312 and 313; the court of appeals accordingly concluded that petitioner was guilty of a "failure to [c]omplete and submit" forms "under" those provisions within the meaning of the citizen suit provision.

The court of appeals also relied on the contrast between the citizen suit provision of EPCRA and the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1251 et seq., which was interpreted by this Court in *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). The Clean Water Act provides that a citizen suit can be

brought only against a person "alleged to be in violation of" the Act. 33 U.S.C. § 1365(a)(1). Accordingly, this Court ruled that a complaint could not be brought under the citizen suit provision unless it alleged a "continuous or intermittent violation" (484 U.S. at 64); a party who had violated the Clean Water Act, but who came into compliance before the suit was brought, could not be "alleged to be in violation" and would accordingly not be subject to a citizen suit. By contrast, the court of appeals explained, EPCRA did not require that a citizen suit allege a defendant "to be in violation"; it required only a "failure" to file "under" the statute. Pet. App. A9-A12. The court of appeals accordingly concluded that EPCRA reached a defendant who filed delinquent reports in response to the notice to sue, but before the complaint was filed.

SUMMARY OF ARGUMENT

I. A. 1. The plain language of the citizen suit provision of EPCRA authorizes CBE's suit. EPCRA authorizes a citizen suit against an owner or operator of a facility for "failure to * * * [c]omplete and submit an inventory form under section [312]" and for "failure to * * * [c]omplete and submit a toxic chemical release form under section [313]." Petitioner is guilty of a "failure to do" these things. A form has not been "complete[d] and submit[ted] * * * under" a statutory provision when the individual submitting the form ignored the deadlines that the provision specifies—any more than a form could be said to have been submitted "under" Section 312 or 313 if it provided inaccurate data or disregarded some other requirement of that section. In fact, the deadlines specified in those provisions are among the most essential requirements in EPCRA. Information supplied years out of time is nearly worthless to the individuals and agencies to whom Congress wanted EPCRA data to be provided—local fire departments and emergency planning officials, and citizens who are concerned about environmental hazards in their neighborhoods.

2. This Court's decision in *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), on which petitioner relies heavily, in fact reinforces the conclusion that EPCRA authorizes CBE's citizen suit. *Gwaltney* disallowed a citizen suit under the Clean Water Act in circumstances parallel to those present here. But the Court in

Gwaltney relied on the language of the Clean Water Act, which permits a citizen suit only against a person "who is alleged to be in violation" of an effluent standard. In EPCRA, Congress did not require a citizen plaintiff to allege that the defendant was "in violation" of the statute. Since every other environmental statute with a citizen suit provision contains the "alleged to be in violation" limitation, Congress's decision not to impose such a limit on EPCRA citizen suits cannot be attributed to inadvertence.

B. In fact, Congress had good reason to choose different language when it drafted the citizen suit provision of EPCRA: petitioner's interpretation would effectively nullify the citizen suit provision of EPCRA. Because EPCRA is an informational statute, a firm will seldom find it difficult to come into compliance with EPCRA within 60 days after receiving notice of a citizen's intent to sue. *Gwaltney* left a substantial role for citizen enforcement of the Clean Water Act: a firm that is in violation of an anti-pollution requirement might have to modify its manufacturing processes or install new equipment, costly tasks that will often take more than 60 days. But a firm that has been ignoring Sections 312 and 313 of EPCRA—or, for example, a firm that does not update its forms and inaccurately reports the same information year after year—will almost always be able to file delinquent, corrected forms within 60 days of receiving notice of intent to sue. Under petitioner's interpretation of EPCRA, such a firm would then be immune from citizen enforcement. Congress could not have intended to permit the elaborate citizen suit provision of EPCRA to be set completely at naught in this way.

II. Article III does not bar CBE's citizen suit. This suit is, as we have shown, authorized by an Act of Congress. It is a suit against a private party, not against an executive official, and therefore does not present separation of powers problems involving judicial supervision of the executive. There is no question that CBE and its members were injured in fact, and that the injury was inflicted by petitioner. And in numerous ways, the relief CBE seeks will redress its and its members injuries. The Court has consistently recognized that Congress may authorize qui tam actions seeking, as this suit does, the payment of a fine to the Treasury; CBE has an even stronger claim to standing than the typical qui tam plaintiff, because CBE was undoubtedly injured in fact.

A. As a result of petitioner's conduct, CBE and its members suffered injury in fact in several forms. First, petitioner denied them the information that EPCRA gives them a right to receive. In this respect, CBE and its members are not just asserting an interest they share with the general public. CBE's members live and work near petitioner's facility, and EPCRA is particularly designed to ensure that individuals living near facilities that use and release toxic chemicals have accurate and timely information.

In addition, because petitioner did not comply with EPCRA, CBE had to expend its own resources to uncover information about petitioner to supply to members of the community. Finally, Congress expected that firms that complied with EPCRA would be likely to pollute less, and petitioner's conduct bears out Congress's judgment: petitioner's reported releases of hydrochloric acid dropped dramatically after it began filing EPCRA reports. The additional environmental injury that petitioner inflicted on the surrounding community, during the time it was ignoring EPCRA, is further injury in fact.

B. CBE's suit also satisfies the requirement of "redressability." There would be no conceivable issue about redressability in this case had petitioner not begun complying with EPCRA when it received CBE's notice of intent to sue. But it is well established that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Northeastern Florida Chapter, Associated General Contractors v. Jacksonville*, 508 U.S. 656, 662 (1993) (citation omitted). That principle is usually applied when the voluntary cessation occurs after suit is brought. Nothing in Article III, however, prohibits Congress from applying the same principle in a case like this, when the voluntary cessation was a response to the notice of intent to sue, and when Congress had compelling reasons not to permit the citizen enforcement scheme to be nullified in this way.

In addition, the relief CBE seeks redresses its injury by punishing petitioner for wrongful conduct and by deterring future wrongful conduct by petitioner. In particular, Congress was entitled to conclude that petitioner would be less likely to violate EPCRA in the future—thus inflicting further injury on CBE and its members—if petitioner had been punished for past violations. This suit also seeks

compensation for some of the injury petitioner inflicted on CBE and its members. The award of litigation costs will include compensation to CBE for the costs of the investigation it was forced to undertake to learn about petitioner's use of toxic chemicals. The possibility of a settlement, through a Supplemental Environmental Project, can remedy some of the environmental injury petitioner inflicted on CBE members.

ARGUMENT

I. EPCRA AUTHORIZES A CITIZEN SUIT AGAINST A DEFENDANT WHO FILES OUT-OF-TIME REPORTS AFTER RECEIVING THE NOTICE OF INTENT TO SUE

A. The Plain Language Of The Citizen Suit Provision Authorizes This Action.

1. The interpretation of the citizen suit provision of EPCRA must, of course, "begin * * * with an examination of the language of the statute." *Ingalls Shipbuilding Inc. v. Director, OWCP*, 117 S. Ct. 796, 801 (1997); see, e.g., *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989). Section 326 of EPCRA authorizes a citizen to bring suit against "[a]n owner or operator of a facility for failure to do" certain specified things. Among those things are "failure to * * * [c]omplete and submit an inventory form under section [312]" and "failure to * * * [c]omplete and submit a toxic chemical release form under section [313]." 42 U.S.C. § 11046(a)(1)(A)(iii) and (iv).

Petitioner is guilty of a "failure to do" these things. Of course, petitioner filed out-of-time forms for previous years, after it had received notice of CBE's intention to sue. But this did not constitute "complet[ing] and submit[ting the forms] under" Sections 312 and 313. The ordinary meaning of "under" a legal provision is "in accordance with" that provision,⁷ and a form cannot be said to have been "complete[d] and submit[ted] * * * under" a statutory provision when the individual submitting the form ignored the deadlines that the provi-

⁷ See, e.g., Webster's Encyclopedic Dictionary, Unabridged Edition (1989), which defines "under" as "14. in accordance with: *under the provisions of law*."

sion specifies—any more than a form could be said to have been submitted "under" Section 312 or 313 if it disregarded some other requirement of that section. As the court of appeals explained, this use of "under" is "simply a way to incorporate the requirements of the referenced section without listing them all over again." Pet. App. A11.

Section 312 provides that "[t]he inventory form * * * shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year." 42 U.S.C. § 11022(a)(1). Petitioner filed no such forms on March 1 of 1988 through 1995. Section 313 specifies that "a toxic chemical release form * * * shall be submitted * * * on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year." 42 U.S.C. § 11023 (a). Petitioner filed no such forms on July 1 of 1988 through 1994. Forms submitted years after those deadlines cannot be said to have been filed "under" Sections 312 and 313.

No one would deny that petitioner had "fail[ed] to * * * [c]omplete and submit an inventory form under section [312]" or Section 313 if petitioner had filed forms that omitted the information required by those sections, such as the identity and quantity of the chemicals. But there is simply no principled basis for distinguishing between the deadlines specified in Section 312 and 313 and the other requirements of those sections. That is why petitioner—whose brief devotes conspicuously little attention to the plain language of Section 326—cannot suggest any plausible explanation of why an untimely filing would not be a "failure to complete and submit" a form "under" Sections 312 and 313.

Petitioner asserts that "[t]he reference to complete and submit forms 'under' Sections 312 and 313 is simply that—a reference to Section 312's inventory form and Section 313's Form R—not a wholesale incorporation of those sections' requirements." Pet. Br. 31-32. But petitioner surely does not deny that filing blank forms, or forms containing information that the owner knew to be inaccurate, would constitute a "failure to complete and submit forms under" Sections 312 and 313. And petitioner does not explain why the requirements of accuracy are "incorporated" but the deadlines speci-

fied in Sections 312 and 313 are not.

In fact, the deadlines specified in those provisions are among the most essential requirements in EPCRA. The information required by EPCRA is far less valuable when it is disclosed belatedly, especially years after it was required. That is apparent from the fact that Congress required annual disclosures. Congress would not have done so if outdated information was as useful as current information.

In addition, EPCRA's specific purposes are served only if information is kept current. For example, forms required under Section 312, specifying the amounts and locations of hazardous chemicals, are filed with the local fire department and local emergency planning agencies. Those officials obviously need current information to plan how to control fires or releases of hazardous chemicals. A form filed years late is of little or no use to them. The same is true for citizens living or raising children in the neighborhood of a facility that uses toxic chemicals, or persons considering whether to buy property in such a neighborhood. In all of those instances, the information required by EPCRA is far less valuable—and may well be altogether useless—if it is disclosed years late. There is, accordingly, no basis whatever, in either the language or the logic of EPCRA, for concluding that a failure to comply with the deadlines specified by Sections 312 and 313 is not actionable in a citizen suit.

2.a. Petitioner relies heavily on this Court's decision in *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). *Gwaltney* held that the citizen suit provision of the Clean Water Act did not authorize a suit against a firm that was in violation of a permit condition when it received notice of intent to sue, but that came into compliance before suit was brought. *Gwaltney*, however, far from supporting petitioner, powerfully reinforces the conclusion that EPCRA authorizes this action. That is because the citizen suit provision of the Clean Water Act is phrased differently from EPCRA's, and the difference is crucial.

The Clean Water Act authorizes an citizen suit "against any person * * * who is alleged to be in violation of" an effluent standard. 33 U.S.C. § 1365(a) (emphasis added). The Court explained in *Gwaltney* that "[t]he most natural reading of 'to be in violation' is a requirement

that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." 484 U.S. at 57.

Had Congress wanted to limit citizen suits under EPCRA in the way petitioner advocates, Congress could simply have borrowed the phrase "alleged to be in violation" from the Clean Water Act. But there is overwhelming evidence that Congress deliberately chose *not* to use that phrase in EPCRA. Every other citizen suit provision in an environmental statute at the time of EPCRA used the phrase "alleged to be in violation." As the Court explained in its most recent decision dealing with a citizen suit provision, the language in a statute must be "compared with the language Congress ordinarily uses." *Bennett v. Spear*, 117 S. Ct. 1154, 1162 (1997). In EPCRA, Congress used different language from what it used in every other citizen suit provision.

In fact, the citizen suit provision of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9659, is limited by the "alleged to be in violation" formulation—and the CERCLA citizen suit provision was enacted as part of the same public law as EPCRA. Pub. Law 99-499 (Oct. 17, 1986). "[I]t is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994), quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (brackets in original).

⁸ See Clean Water Act, 33 U.S.C. § 1365 (1972); Marine Protection Research & Sanctuaries Act, 33 U.S.C. § 1415(g) (1972); Noise Control Act, 42 U.S.C. § 4911 (1972); Endangered Species Act, 16 U.S.C. § 1640(g) (1973); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1974); Deepwater Port Act, 33 U.S.C. § 1515 (1975); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(A) (as amended 1984); Toxic Substances Control Act, 15 U.S.C. § 2619 (1976); Surface Mining Control & Reclamation Act, 30 U.S.C. § 1270 (1977); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (1978); Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9659 (1986); Hazardous Liquid Pipeline Safety Act, 42 U.S.C. § 2014. RCRA contains an additional citizen suit provision that does not use the term "alleged to be in violation," but that provision, also, focuses on ongoing harm. See 42 U.S.C. § 6972(a)(1)(B).

Against this background, the obvious inference is that Congress used the distinctive language of the citizen suit provision of EPCRA because it wanted to do something different in EPCRA: Congress's decision to deviate, in EPCRA, from "the language it ordinarily uses" in citizen suit provisions (*Bennett*, 117 S. Ct. at 1162) establishes that Congress did not want to require citizens suing under EPCRA to "allege[the defendant] to be in violation" of the Act at the time of the suit. In *Gwaltney*, the Court emphasized that the phrase "'alleged to be in violation' [i]s a statutory term of art rather than a mere stylistic infelicity" (484 U.S. at 62). Congress's decision *not* to use that "term of art" also should not be viewed as a mere stylistic variation.

Petitioner, again, has no plausible explanation for Congress's decision to use the phrase "failure to * * * [c]omplete and submit [forms] under" Sections 312 and 313 instead of the customary "alleged to be in violation." Petitioner's only suggestion appears to be that because Sections 312 and 313 require only the filing of documents, the use of the term "violation" would somehow be inapposite. See Pet. Br. 31. But this argument, implausible on its face, is contradicted by the text of EPCRA itself. The provisions of EPCRA specifying civil penalties refer to a failure to comply with Section 312 or 313 as a "violation." 42 U.S.C. § 11045(c)(1). Moreover, those provisions show that Congress's understanding in EPCRA, too, was that a "violation" of a reporting requirement "continues" until the report is filed out of time, at which point the "violation" ceases. See 42 U.S.C. § 11045(c)(3).⁹ The phrase "to be in violation" would, therefore, have had a clear meaning under EPCRA—the very meaning that petitioner wishes to impute to the citizen suit provision. Congress, however, chose not to use that phrase.

⁹ Under these provisions, a failure to submit a required report under Section 312 or 313 renders a person liable for a civil penalty of up to \$25,000 "for each violation," and "[e]ach day a violation * * * continues shall, for [these] purposes * * * constitute a separate violation." 42 U.S.C. § 11045(c)(1), (3). Thus the term "violation" under EPCRA denotes a state of affairs that can be brought to an end by filing an out-of-time report.

b. In other ways, as well, the logic of *Gwaltney* not only is inapplicable to EPCRA but helps show that EPCRA authorizes CBE's suit in this case. The Court in *Gwaltney* remarked on the "undeviating" and "pervasive use of the present tense" in the citizen suit provision of the Clean Water Act—usage that, the Court believed, further suggested that citizen suits were limited to unlawful conduct that was ongoing at the time suit was filed. 484 U.S. at 59. Section 326 of EPCRA stands in sharp contrast. The term "failure," of course, is not taken most naturally to refer to ongoing action but to action in the past. Also, the venue provision for citizen suits under EPCRA, Section 326(c), provides that citizen suits "shall be brought in the district court for the district in which the alleged violation *occurred*." 42 U.S.C. § 11046(c) (emphasis added). This, of course, suggests that citizen suits may be brought for violations that were completed by the time the suit was filed.

Similarly, *Gwaltney* found "most telling" the definition of a citizen authorized to bring suit under the Clean Water Act: "'a person . . . having an interest which is or may be adversely affected' by the defendant's violations of the Act." 484 U.S. at 59, quoting 33 U.S.C. § 1365 (g). The Court reasoned that this limitation on the class of individuals authorized to sue revealed that Congress intended to allow citizen suits only against ongoing violations. Under the citizen suit provision of EPCRA, by contrast, "*any person* may commence a civil action" (42 U.S.C. § 11046(a)(1) (emphasis added)). This Court has recently commented on the "remarkable breadth" of the "any person" formulation, contrasting it explicitly to "the language Congress ordinarily uses" in citizen suit provisions. *Bennett v. Spear*, 117 S. Ct. 1154, 1162 (1997). These aspects of EPCRA are further evidence that the approach taken in *Gwaltney*, when applied to EPCRA, leads not to the result petitioner suggests but to the conclusion that CBE's suit should be allowed.

There are other differences, as well, between the Clean Water Act citizen suit provision considered in *Gwaltney* and Section 326 of EPCRA. The legislative history of the Clean Water Act contained numerous statements suggesting that the citizen suit provision was intended only to abate or prevent pollution. See 484 U.S. at 61-63. The legislative history of EPCRA contains nothing comparable. In

addition, the Court in *Gwaltney* was concerned that citizen suits under the Clean Water Act might interfere with EPA efforts to settle an administrative enforcement proceeding. See 484 U.S. at 60-61. But under EPCRA, EPA's initiation of administrative enforcement proceedings bars a citizen from filing suit. 42 U.S.C. § 11046(e).

There is, to be sure, one conspicuous use of the present tense in Section 326. But far from aiding petitioner, it wholly undermines one of petitioner's principal arguments. The notice provision of Section 326 requires that the citizen plaintiff give notice to, among others, "the State in which the alleged violation *occurs*" (42 U.S.C. § 11046(d)(1) (emphasis added)). This is in direct contrast to the venue provision, according to which citizen suits "shall be brought in the district court for the district in which the alleged violation *occurred*." 42 U.S.C. § 11046(c) (emphasis added). The most reasonable inference from this contrast is that the violation must be ongoing at the time notice is given—but need not be ongoing at the time suit is brought. That is, of course, precisely the situation here.

Petitioner raises the spectre that citizen plaintiffs will "exhume past violations" by "search[ing] old government records to determine which companies filed late EPCRA reports and then su[ing.]" Pet. Br. 47. Of course, that is not what this case involves, and the Court need not reach the question whether EPCRA permits such citizen suits. But in any event, the contrast in tenses between the venue and notice provisions provides a firm basis for distinguishing this suit from any such "exhumation." And nothing in EPCRA suggests that a firm that files overdue forms only in response to the notice of intent to sue can thereby gain immunity from a citizen action.

3. Petitioner places its greatest emphasis on the fact that Section 326 contains a notice requirement. See Pet. Br. 14-20. Petitioner relies on the Court's conclusion in *Gwaltney* that the notice provision of the Clean Water Act was intended to provide polluters an opportunity to come into "complete compliance" with that Act and thereby "render unnecessary a civil suit." 484 U.S. at 60. In the context of a statute like the Clean Water Act, which authorizes citizen suits *only* against defendants "alleged to be in violation," this is undoubtedly one purpose to which the notice period might be put.

Petitioner's argument, however, presupposes that this is the only purpose of the notice period. Congress's actions in amending another citizen suit provision—that found in the Clean Air Act, 42 U.S.C. § 7604—demonstrate that this presupposition is false. At the time of *Gwaltney*, the Clean Air Act authorized citizen suits only against persons "alleged to be in violation" (42 U.S.C. § 7604(a) (1982)). In 1990, Congress added a provision allowing citizen suits in certain circumstances against any person "who is alleged to have violated" the Act. 42 U.S.C. § 7604(a)(1),(3). This made it clear that citizen suits could be brought even for violations that had entirely ceased by the time of the suit.

When Congress made this change, however, it did not remove the notice requirement. See 42 U.S.C. § 7604(b). If petitioner's argument were correct—that the only reason for a notice requirement is to permit a violator to come into compliance and avoid being sued—the notice requirement of the amended Clean Air Act would have been pointless. Congress obviously did not regard it as such. This establishes that the notice period must have other purposes besides allowing potential defendants to cease their violations.

Petitioner asserts (Pet. Br. 20) that Congress would have amended EPCRA, just as it amended the Clean Air Act, if it wished *Gwaltney* not to apply to EPCRA. But of course Congress had no reason to believe that EPCRA needed to be amended. The language of EPCRA was, as we have explained, entirely different from the language that the Court construed in *Gwaltney*. In addition, until the Sixth Circuit's decision in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, *supra*, an unbroken series of lower court decisions construed EPCRA to permit citizen suits against defendants who ceased their violations only in response to the notice of intent to sue. See page 6, *supra*. Congress's decision to leave EPCRA unchanged therefore suggests, if anything, that it considered *Gwaltney* inapplicable to EPCRA. And its decision to amend the Clean Air Act, while leaving the notice period intact, demonstrates that the notice period serves other purposes besides enabling a violator to come into compliance.

That conclusion about the notice period is evident in any event. As this Court noted not only in *Gwaltney*, 484 U.S. at 59, but again in *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989), one other purpose of the notice period is to allow the EPA to determine whether it wishes to bring an enforcement proceeding against the alleged violator, thereby barring a citizen suit. The notice period of EPCRA continues to serve this purpose under the approach taken by the court of appeals in this case.

More fundamentally, however, the notice period in citizen suit provisions serves the purpose that notice periods serve generally—they allow for a dispute to be settled before litigation begins. For example, Congress has provided for notice to be given to the prospective defendant even in cases in which only damages will be sought, such as under the Federal Tort Claims Act. See 28 U.S.C. § 2675(a). The purpose of that notice provision cannot possibly be to allow the defendant to come into compliance; it is obviously to allow for a settlement. The same purpose is served by the notice requirement of EPCRA.

A notice requirement is a particularly efficient way to serve this purpose in a statutory scheme like EPCRA, where the potential defendant has accurate and complete information about the existence of a violation of the law, and the plaintiff's information is very likely to be fragmentary. Ordinary citizens seldom have complete access to information about the use and storage, or even the release, of toxic substances at a private industrial plant. Citizen suits under EPCRA are very likely, as a result, to be based on inferences and extrapolations from publicly available data. The notice period enables the potential EPCRA defendant to provide additional information that might show that those inferences and extrapolations are incorrect, or that for some other reason a suit should not be brought. All of this can be done before suit is filed and positions begin to harden. Petitioner's principal argument, therefore—that the existence of a notice provision shows that EPCRA must bar suits like CBE's—is not plausible.

B. Petitioner's Interpretation Would Effectively Nullify The Citizen Suit Provision Of EPCRA.

Congress had good reason to choose different language when it enacted the citizen suit provision of EPCRA. *Gwaltney's* interpretation of the citizen suit provision of the Clean Water Act still leaves a substantial role for citizen enforcement. But the interpretation of EPCRA for which petitioner contends would effectively nullify Section 326. Petitioner asserts that citizen suit provisions in the various environmental statutes "resemble each other almost completely" (Pet. Br. 14) and that Section 326 of EPCRA should be interpreted in accordance with this supposed "customary citizen suit model." Pet. Br. 12. As we have shown, the language of the Section 326 directly contradicts this assertion. But beyond that, EPCRA is unlike other environmental statutes because it is strictly an informational statute. This fundamentally alters the way citizen suits function, and it explains why Congress used different language in EPCRA.

1. Because EPCRA is an informational statute, it is relatively easy for a firm to come into compliance with EPCRA on short notice. Compliance with EPCRA requires, so to speak, only paperwork—not (as often in the case of a statute like the Clean Water Act) the reengineering of manufacturing processes or the installation of new equipment. A firm that has been ignoring Sections 312 and 313 of EPCRA will almost always be able to submit all delinquent forms within 60 days after it receives notice of intent to sue. Under petitioner's interpretation of EPCRA, such a firm will then be immune from a citizen suit.

If petitioner prevails, therefore, the citizen suit provision of EPCRA will be effectively nullified in all but rare cases. Firms that receive notice from a potential citizen plaintiff will simply, as a matter of course, file the past-due forms within 60 days. This is especially so because, contrary to petitioner's suggestions, the filing

requirements of EPCRA are not particularly onerous; much of the information must already be gathered by firms for other purposes.¹⁰ See Pet. App. A4.

One might suppose that, if firms do come into compliance in this way, the purposes of EPCRA will have been achieved, and without litigation. But that is not so. EPCRA can be successful only if the information on file is accurate and up to date. Out-of-time filings, prompted only by the threat of litigation, will not serve EPCRA's purposes.

Moreover, it is difficult and time-consuming for citizens and citizen groups to try to identify private firms that are using toxic chemicals. Since citizen plaintiffs can recover fees only if they prevail in litigation, petitioner's interpretation of Section 326, if it were to prevail, would cause citizen groups to lose much of their incentive, and their financial ability, to engage in the investigations needed to identify firms that are ignoring their reporting obligations under EPCRA.

No doubt some level of investigation by citizen groups will continue, but it will be much reduced. Because nearly all defendants will come into compliance once they receive notice, citizen suits under Section 326 will become virtually unknown. In view of the importance Congress attached to citizen enforcement—and the well-known problems of enforcement that always plague self-reporting schemes, and that appear to afflict EPCRA as well—it is extremely unlikely that Congress intended these results. Congress's choice of distinctive language in Section 326, can, therefore, only be seen as authorizing—for this distinctive, informational statute—citizen suits for overdue reporting violations.

The contrast with statutes such as the Clean Water Act again illustrates why the distinctive language of the EPCRA citizen suit provi-

¹⁰ Petitioner's claims about how burdensome compliance with EPCRA is (Pet. Br. 42-43) are refuted by EPA's most recent Federal Register notice on the subject. See 62 Fed. Reg. 23834, 23889 (May 1, 1997) (forms required under Section 313 require an estimated average of 74 hours per report in the first year and 52.1 hours per report in subsequent years); See also Pet. App. A4 (Section 312 reports range in annual fixed costs from \$43.50 to \$146.81)

sion is so significant. Complying with the Clean Water Act will often involve substantial expense, and extensive changes in plant and equipment. This is especially so because, under *Gwaltney*, a defendant who has committed a violation can escape a citizen suit only by "demonstrat[ing] that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" 484 U.S. at 66 (citation and emphasis omitted). It will be often be difficult for a firm that is "in violation" to meet that burden within sixty days.

Moreover, if a firm does come fully into compliance, it will often be reasonable to expect that—having already made the investment in modified processes or new equipment—the firm may not resume polluting once the threat of a citizen suit abates. By contrast, on petitioner's view of EPCRA, nothing in the citizen suit provisions prevents a defendant from filing past-due reports when it receives a notice of intent to sue, then simply ignoring EPCRA until it receives another such notice.

2. This aspect of EPCRA also further confirms the artificiality of petitioner's suggestion (Pet. Br. 31-32) that the deadlines specified in Sections 312 and 313 are different from the other requirements of those sections, so that a citizen suit can be brought only for a violation of the other requirements, not for a violation of the deadlines. If petitioner's interpretation of EPCRA were to prevail, firms could file forms, before the statutory deadlines, with any information they chose to supply. They could, for example, simply not update their forms from year to year—planning to update the forms if and when a potential citizen plaintiff discovered the violation and gave notice of intent to sue. So long as they filed corrected forms before suit was brought, they would be guilty of only an out-of-time filing and, under petitioner's approach, they could not be named in a citizen suit. In this way, a firm could use the loophole petitioner seeks to create—an immunity from citizen enforcement, so long as the firm comes "into compliance" within sixty days after its wrongdoing is discovered—to disregard any aspect of EPCRA's reporting requirements.

It is, of course, no answer to say that the government is available to enforce EPCRA against firms that engage in such actions. One thing that is clear—not only from the legislative history of EPCRA (see page 3, *supra*) but from the very existence of Section 326—is that

Congress did not intend to rely entirely on government enforcement. It envisioned an important role for citizen suits. As we have explained, such a role is consistent with *Gwaltney*. But Congress could not have intended the carefully-designed citizen suit provision of EPCRA to be set at naught by firms that take the simple expedient of filing once their violation of EPCRA are discovered.

II. ARTICLE III DOES NOT BAR CONGRESS FROM AUTHORIZING THIS CITIZEN SUIT

Although petitioner did not challenge CBE's standing in the court of appeals, petitioner now asserts that Article III bars this citizen suit, even if EPCRA authorizes it, because CBE lacks standing. Pet. Br. 34-41. Petitioner's cursory argument on this point gives no hint of how far-reaching its claim is, and of how much this case differs from any other in which this Court has found that the plaintiff lacked standing. To begin with, CBE's suit is, as we have shown, authorized by an Act of Congress, and it is extremely rare for this Court to rule that Congress has exceeded the bounds of Article III.¹¹

¹¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), is arguably the only case in which this Court has done so. See R. Fallon, et al., *Hart and Wechsler's The Federal Courts and the Federal System* 169-70 (4th ed. 1996). In *Muskrat v. United States*, 219 U.S. 346 (1911), the Court invalidated an Act of Congress on Article III grounds, but the Court's concerns appear to have been that the Act authorized the issuance of an advisory opinion and that the defendant had no stake in the case. See *id.* at 361. In *McClure v. Reagan*, 454 U.S. 1025 (1981), the Court summarily affirmed, without opinion, a district court decision denying standing to a member of Congress to challenge a judicial appointment. A special Act of Congress had purported to grant standing in those circumstances. See *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho 1981).

In fact, there is a broad consensus in the academic literature that the question of standing should be viewed as identical to the question whether a statute or constitutional provision creates in the plaintiff a right to bring suit. See, e.g., Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 451-55 (1974); Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41; Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. 37; Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988); *id.* at 223 n. 18 (collecting authorities).

Perhaps more important, this is a suit against a private party, not against a government official or government agency. It therefore involves no effort "to transfer from the President to the courts the Chief Executive's most important Constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992). The separation of powers is the "single basic idea" on which "the law of Art. III standing is built" (*Allen v. Wright*, 468 U.S. 737, 752 (1924)). This case—a lawsuit between two private parties, alleging a wrong in the past, and seeking primarily the payment of money—is manifestly a form of litigation that "is 'consistent with the separation of powers and * * * traditionally thought to be capable of resolution through the judicial process.'" *Allen v. Wright*, 468 U.S. at 752, quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

"To satisfy the 'case' or 'controversy' requirement of Article III, * * * a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 117 S. Ct. at 1163, citing *Defenders of Wildlife*, 504 U.S. at 560-61. It is beyond serious dispute that petitioner's admitted failure to comply with EPCRA inflicted injury on CBE, thus satisfying the "injury in fact" and "fairly traceable" elements of the standing inquiry. The requirement of "redressability," to the extent it applies in a suit of this kind, is satisfied in numerous ways: the award of civil penalties will punish petitioner for the injury it inflicted on CBE and its members and deter future injury to CBE and its members; and the award of litigation costs will compensate CBE for the cost of discovering information that would have been freely available, had petitioner not violated EPCRA.

A. CBE Suffered Injury In Fact Caused by Petitioner's Conduct

1. EPCRA's title itself identifies the injury inflicted by petitioner's conduct. EPCRA is intended to enforce a "right to know," that is, a right to information. By failing to file the required forms, petitioner deprived CBE and its members of information to which CBE was entitled. Under EPCRA, the information on Section 312 and 313 forms is made available to the public, and the public is notified of its availability. 42 U.S.C. §§ 11022(e), 11023(h). The information from

Section 313 forms is compiled in a computer database readily available to members of the public. See 42 U.S.C. § 11023(j). Had petitioner complied with EPCRA, both CBE and its members would have had access to information about petitioner's use and release of toxic chemicals. Because of petitioner's wrongdoing, they did not have access to that information.

There is no question that "injury to a statutorily created right to truthful * * * information" can constitute "injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982). See, e.g., *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989). But the injury inflicted on CBE and its members is even more "distinct and palpable" (*Warth v. Seldin*, 422 U.S. 490, 501 (1975)) than that. This is a case in which Congress has, with specificity, "identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring).

That is because EPCRA is concerned not just with the public dissemination of information, but with making information available to a specific group: individuals who live and work near the facilities that use and release toxic chemicals. EPCRA was enacted partly in response to the accidental release of toxic chemicals in Bhopal, India, in which over 2,000 people were killed and countless injured in the surrounding area, and to a similar but less devastating release of toxic chemicals in Institute, West Virginia. See Pet. App. A2. Congress well understood that people living near industrial facilities that use toxic chemicals are most in need of the information that EPCRA compels the users of toxic substances to disclose, so that they can prepare for emergencies—a principal focus of EPCRA—and attempt to work with the industrial users of toxic substances to mitigate or eliminate the hazards.

This is explicit in the language of the statute itself: Section 313, one of the provisions that petitioner violated, states that "the release forms required under this section are intended to provide information" not only "to Federal, State, and local governments" but to "the

public, including citizens of communities surrounding covered facilities." 42 U.S.C. § 11023(h). It is reinforced by the legislative history of EPCRA. See, e.g., H. R. Rep. 962, 99th Cong., 2d Sess. 281, 299 (1986) (Conference Report) ("[EPCRA] establish[es] programs to provide the public with important information on the hazardous chemicals in their communities. * * * The information collected under [Section 313] is intended to inform the general public and the communities surrounding covered facilities about release of toxic chemicals"); H.R. Rep. 253, 99th Cong., 2d Sess. pt 1 at 59 (1985) ("The purpose of EPCRA is to provide the public with important information on hazardous chemicals in their communities.").

CBE's complaint specifically alleged that CBE members "reside, own property, engage in recreational activities, breathe the air, and/or use areas near [petitioner's] facility." J.A. 5. The complaint also states that CBE's members "seek, acquire, and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work, and visit." J.A. 5. Thus CBE and its members "ha[ve] suffered injury in precisely the form the statute was intended to guard against" (*Havens Realty Corp.*, 455 U.S. at 373): they are within a narrow, geographically-defined class of individuals to whom Congress gave a right to information about facilities like petitioner's—facilities in the immediate geographical area. The existence of injury in fact is, therefore, beyond serious question in this case.

2. While the denial of information is sufficient to establish injury in fact to both CBE and its members, petitioner also injured CBE in its organizational capacity (see, e.g., *Warth*, 422 U.S. at 511). Because petitioner failed to comply with EPCRA, CBE had to conduct an independent investigation to discover information about the chemicals used at petitioner's plant. As we have noted, CBE conducted such an investigation, based partly on a report from a member of the public to the effect that petitioner was releasing "acidic material" from its smokestacks at night. Instead of being able to obtain the information that petitioner should have disclosed under EPCRA, CBE had to examine a variety of other sources to try to discover evi-

dence about the kinds of chemicals that petitioner was storing and releasing.¹² The additional costs that CBE incurred in conducting that investigation—to obtain the very information that EPCRA requires petitioner to disclose—were a “drain on the organization’s resources” that, as the Court has held, constitutes a further injury in fact to the organization. *Havens Realty Corp.*, 455 U.S. at 379.

As the complaint alleges, CBE and its members systematically gather information on facilities in their neighborhood that use toxic chemicals and make that information available to people living nearby. CBE prepares, for example, a *Guide to Southeast Chicago’s Major Polluting Industries*, which is “designed to help southeast Chicago residents better understand the magnitude of the toxics threat with which they are living on a daily basis and to provide them with the information and some tools they can use to begin working proactively to reduce that threat.” *Id.* at 1.¹³ The listing of each firm specifies in detail the amounts and toxicity of the chemicals stored and released by each firm. The guide is compiled from forms filed under EPCRA. Petitioner’s facility would have been described in the most recent issue of the guide, and the information that Congress sought to make available to the surrounding neighborhood would have been available—had petitioner not violated EPCRA.

EPCRA, as we have said, was intended in large part to make readily available to individuals and groups precisely the kind of information CBE includes in its guide. But because petitioner ignored EPCRA’s requirements, CBE had to expend its own resources to conduct a much more expensive independent investigation, which culminated in its discovery that petitioner used and released toxic chemicals. This expenditure—precisely one of the things EPCRA sought to avoid—is additional injury in fact.

¹² See Plaintiff’s Memorandum in Opposition to “Motion to Dismiss,” No. 95 C 4534 (N.D. Ill.), filed Oct. 5, 1995, Exh. 1 (Affidavit of Stefan A. Noe).

¹³ A copy of this document has been lodged with the Clerk of the Court and served on counsel for petitioner.

3. Finally, there is reason to believe that petitioner’s failure to file reports under EPCRA was also responsible for greater pollution in the environment near its plant. One principal purpose of EPCRA was to induce firms that used toxic chemicals to learn about their own practices; another was to expose those firms to public opinion. Congress expected that the result would be less use of toxic chemicals and less pollution, and the history of EPCRA has dramatically borne out Congress’s judgment. See page 3, *supra*.

In fact, petitioner itself sharply reduced its releases of toxic chemicals after it began filing EPCRA reports. From 1988 to 1993, when petitioner was not filing its annual Section 313 reports, its hydrochloric acid air releases increased almost every year. For 1993, petitioner reported air emissions of 124,787 pounds of hydrochloric acid. For 1995—after this suit was brought—petitioner reported emissions of only 27,560 pounds.¹⁴ This makes it much more than “speculation” (*Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44 (1976)) to say that compliance with EPCRA during the period from 1988 to 1995 would have affected petitioner in the way that Congress envisioned, and in the way that so many other firms were affected: petitioner would have reduced its releases of toxic chemicals. The additional toxic chemicals to which CBE and its members were exposed, as a result of petitioner’s noncompliance, is another injury in fact that petitioner inflicted on CBE.

B. CBE’s Suit Satisfies the Requirement of Redressability

For these reasons, it is beyond serious dispute that CBE was injured in fact. Even petitioner does not dispute that CBE’s injury is “fairly traceable” to petitioner’s failure to submit forms under EPCRA, rather than the actions of some third party. The only remaining issue is whether CBE’s injuries are “redressable” by the relief that CBE seeks.

¹⁴ The 1988-93 figures are reported in The Steel Company’s Reply Memorandum in Support of Its Motion to Dismiss, No. 95 C 4534 (N.D. Ill.), filed Oct. 19, 1995, Exh. B. The 1995 figure is contained in the Form R for that year that petitioner filed with the EPA. We have lodged a copy of that document with the Court and served it on petitioner.

1. a. The requirement of redressability has been developed and applied by this Court primarily in cases in which a plaintiff has sought an injunction against a government official or agency. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-71 (1992) (plurality opinion); *Allen*, 468 U.S. at 757-61; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472-76 (1982); *Simon*, 426 U.S. at 39-46. In such cases, this requirement serves a vital purpose: it ensures that courts will interfere with executive officials' performance of their duties only when such interference is necessary to prevent continued injury to the plaintiff. Otherwise, a plaintiff who suffered some form of injury in fact could, by asserting a connection between that injury and some government policy, use litigation as a way to enlist the judicial branch in supervising the legality of the actions of executive officials—a role far different from that contemplated by Article III. See *Valley Forge Christian College*, 454 U.S. at 473, quoting *United States v. SCRAP*, 415 U.S. 669, 687 (1973).¹⁵

This, however, is not a suit that “seek[s] a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties” (*Allen*, 468 U.S. at 761); rather, it is “a case brought * * * to enforce specific legal obligations where violation works a direct harm.” *Ibid.* In such cases, the Court has omitted any mention of redressability in stating the requirements of Article III and has required only what is plainly present here: “the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); see, e.g., *Havens Realty Corp.*, 455 U.S. at 372. See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977); *Warth*, 422 U.S. at 501. The reason is that in such cases, there is no danger that the litigation seeks to give courts a general authority to police the legality of the actions of executive officials, since such officials are

¹⁵ That is why often “the ‘redressability’ analysis is identical to the ‘fairly traceable’ analysis.” *Allen*, 468 U.S. at 759 n. 24.

not parties to the case, and no danger of undue interference with the activities of private parties—so long as the plaintiff can show, as CBE can here, that the defendant against whom it seeks relief is the party who actually injured it, and that the relief sought is authorized by Congress.

b. Perhaps for this reason, the Court has consistently acknowledged the constitutionality of informer's actions, or qui tam actions, in which a private person sues another private person, seeking to compel the payment of a fine to the government plus a bounty of some sort—generally a percentage of the government's recovery—to the plaintiff. The bounty cannot be said to “redress” the plaintiff's injury; it is simply a reward for bringing suit. Indeed in the typical qui tam action, the plaintiff need not show any injury to himself at all, beyond the injury he suffers as an undifferentiated member of the public. Cf. *United States v. Richardson*, 418 U.S. 166 (1974). Nevertheless, “[s]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, had been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.” *United States ex rel Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943), quoting *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

As early as 1805, Chief Justice Marshall remarked that “[a]lmost every fine * * * under a penal statute, may be recovered by a [private] action of debt as well as by information [filed by the government.]” *Adams, qui tam, v. Woods*, 6 U.S. 336, 341 (1805). And as recently as 1992, the Court went out of its way to avoid drawing into question such “case[s] in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff.” *Defenders of Wildlife*, 504 U.S. at 573. See also *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340 (June 16, 1997). This long-standing and consistent endorsement of the qui tam action is especially significant because, as the Court has said, the requirements of Article III are “not susceptible of precise definition” (*Allen v. Wright*, 468 U.S. at 751): to a large degree, they draw their content from tradition and “common understanding[s].” *Defenders of Wildlife*, 504 U.S. at 560.

CBE's standing follows a fortiori from the qui tam cases. As in those cases, the principal "redress" CBE seeks is a payment to the federal treasury. But CBE, unlike the typical qui tam plaintiff, can show a distinct and concrete injury to itself and its members, and it can show that the defendant inflicted that injury. It therefore has a far greater "warrant [for] invocation of federal court jurisdiction" (*Warth*, 422 U.S. at 498) than the qui tam plaintiff does.

The only difference between a citizen suit like CBE's and a traditional qui tam action—other than CBE's injury in fact, which makes this a far more appropriate form of litigation under Article III—is the kind of incentive Congress used to motivate plaintiffs to sue. In a citizen suit under EPCRA, a victorious plaintiff can recover the "costs of litigation" (42 U.S.C. § 11046(f)); the typical qui tam plaintiff receives a percentage of the government's recovery. But there is no basis for reading into Article III a limitation on the judgments Congress may make about the appropriate incentive scheme.

An award of the "costs of litigation" under EPCRA is made to the plaintiff, not to the attorney. The award is contingent upon the plaintiff's prevailing. The fact that the plaintiff recovers the costs of litigation if he prevails, but not if he loses, is surely enough to give the plaintiff "a personal stake in the outcome of the controversy" (*Flast v. Cohen*, 392 U.S. 83, 101 (1968), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)), and thereby "assure that concrete adverseness which sharpens the presentation of issues upon which the court * * * depends." *Simon*, 426 U.S. at 38 & n. 16, quoting *Baker*, 369 U.S. 204.¹⁶ EPCRA provides for "litigation costs," not just attorney's fees, so the citizen plaintiff himself will be compensated for resources spent on the litigation. Of course, the citizen plaintiff may not show a net financial gain, but that is true of any victorious civil plaintiff

¹⁶ Petitioner relies on *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990), and *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986), for the proposition that "awarding attorney's fees does not constitute sufficient interest in a case for Article III purposes." Pet. Br. 38. But neither case states such a sweeping, and implausible, proposition, and neither is apposite here. In *Lewis*, the case became moot during the course of litigation, and there was no longer a live dispute between the parties on the merits; the Court held that the interest in fees was insufficient to establish a con-

who finds that the amount of the judgment he has recovered (including the bounty, in a qui tam action) is equal to or less than the costs of litigation.

In fact, the differences between litigation costs and a percentage bounty suggest, if anything, that an award of litigation costs is a more rational way to provide an incentive for private parties to sue. That is because the payment is calibrated to the amount of time and effort that were expended in enforcing the law. A bounty might provide an inadequate incentive to bring a particularly complex suit, and might provide a windfall in an easy case. By contrast, the citizen suit provision of EPCRA, if properly administered, will always protect a victorious plaintiff from having to bear the litigation costs of enforcing the law and obtaining a payment into the federal treasury. The relative irrationality of a bounty, compared to a fee award, is no doubt why Congress has, in recent times, increasingly (although not exclusively) enacted citizen suit provisions, providing for the award of fees, instead of qui tam actions.

It is, in any case, difficult to see why the desirability of different incentive schemes should make a difference for Article III purposes. That is a choice that should be left to Congress. It would be pointless to conclude that Section 326 is unconstitutional as written, but would

tinuing Article III case or controversy. Here, of course, there is a continuing live dispute on the merits between the parties in this case: CBE claims that, among other things, petitioner is liable for civil penalties, and petitioner disagrees.

Diamond involved facts utterly unlike those present here. In *Diamond*, a party intervened in a lower court to defend the constitutionality of a state statute; the lower court invalidated the statute and awarded fees against the intervenor. When the state declined to seek review in this Court, the Court held that the intervenor had no cognizable interest, sufficient to satisfy Article III, in defending the constitutionality of the state law. In those circumstances, the intervenor's interest in having the award of fees vacated was not sufficient to satisfy Article III. See 476 U.S. at 70. CBE, unlike the intervenor in *Diamond*, is not relying on the provision for attorney fees incurred in prosecuting (or defending) the lawsuit to establish injury in fact; CBE has amply shown injury in fact from several other sources. Moreover, while the intervenor in *Diamond* had no cognizable interest in the merits of the case—he had no more authority to defend the constitutionality of the state statute than any member of the general public did—an Act of Congress grants CBE a right to pursue civil penalties against petitioner.

become constitutional if Congress provided, instead of litigation costs, a bounty—even a relatively small bounty of a kind that would be almost certain not to cover the costs of litigation. Indeed it would be highly paradoxical to conclude that a citizen suit like CBE's, where the plaintiff can show injury in fact inflicted by this defendant, is barred by Article III, even though a *qui tam* action brought by a "stranger"—an individual who can show no injury in fact—is allowed to proceed, just because Congress chose to award litigation costs instead of an arbitrary percentage bounty.¹⁷

2. Petitioner's contentions about "redressability" should be rejected for another reason as well. A redressability issue arises in this case, if at all, only because petitioner filed its delinquent forms in response to CBE's notice of intent to sue, thus making injunctive relief unnecessary. Had petitioner not ceased its unlawful conduct in this way, no one would deny that CBE's suit satisfied the requirements of Article III. Under a well-established line of cases, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Northeastern Florida Chapter, Associated General Contractors v. Jacksonville*, 508 U.S. 656, 662 (1993), quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

These cases, of course, usually involve litigation that has already begun. In such circumstances, the defendant's voluntary cessation of the unlawful practice does not render a case moot unless it is "absolutely clear" that "the allegedly wrongful behavior could not reasonably be expected to recur." *Vitek v. Jones*, 445 U.S. 480, 487 (1980), quoting *Phosphate Export Ass'n*, 393 U.S. at 203. In particular, the federal courts do not lack power to adjudicate such cases even if, as here, the defendant's cessation of wrongdoing has "ma[d]e

¹⁷ There is substantial historical material, which the Court has not yet had occasion to address, supporting the power of Congress to authorize suits in circumstances where standing would otherwise be lacking. These materials are canvassed in Berger, *Standing to Sue in Public Actions*, 78 Yale L.J. 816 (1969); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1269-82 (1961); Winter, *The Metaphor of Standing*, 40 Stan. L. Rev. 1371, 1394-1425 (1988); Sunstein, *What's Standing After Lujan?*, 91 Mich. L. Rev. 163, 168-179 (1992).

injunctive relief unnecessary." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203-04 (1968). See, e.g., *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33, 635-36 (1953).

Here Congress has, for compelling practical reasons, applied this voluntary cessation principle to conduct taken by the defendant in response to the notice of intent to sue, rather than in response to the filing of the complaint. There is no reason to doubt that Congress has the power to do this. Indeed, the Court's seminal case on the voluntary cessation rule anticipates this situation: "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform *especially when abandonment seems timed to anticipate suit*, and there is probability of resumption." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), quoting *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952) (emphasis added).¹⁸

It of course does not follow that there should be a general judge-made "voluntary cessation" exception to standing doctrine, parallel to that for mootness. But by the same token, Article III should not be construed to bar Congress from applying a "voluntary cessation" principle to permit standing. Both standing and mootness are Article III doctrines (see, e.g., *Honig v. Doe*, 484 U.S. 305, 317 (1988)), so the voluntary cessation principle developed in the mootness cases must, of necessity, be consistent with Article III.¹⁹ Here, moreover, Congress had excellent reasons to afford a right to sue: as we have explained, otherwise Congress could not provide a 60-day notice period, which serves many useful purposes, without enabling firms like petitioner effectively to nullify citizen enforcement.

¹⁸ Cf. *Defenders of Wildlife*, 504 U.S. at 570 n.4 (plurality opinion) (emphasis added) (A "defendant * * * can dispel jurisdiction by conceding the merits (and presumably thereby suffering a judgment)").

¹⁹ See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980), quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973) ("[Mootness is] the doctrine of standing set in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness).").

This conclusion is not in tension with the principle of *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824), that “jurisdiction * * * depends upon the state of things at the time of the action brought, and * * * after vesting, it cannot be ousted by subsequent events.” See, e.g., *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938); *Smith v. Sperling*, 354 U.S. 91, 93 n. 1 (1957). Of course, that principle refers only to the “ouster” of federal jurisdiction, not to its creation, and therefore has no direct application to the issue presented here. Perhaps more important, the Court has never suggested that the principle of *Mollan v. Torrance* is a constitutional principle, as opposed to a principle of statutory construction. Indeed it cannot be a constitutional principle, because mootness provides a clear example of “jurisdiction * * * ousted by subsequent events.” See *Honig*, 484 U.S. at 317 (Article III requires that a case be “an actual case or controversy” at the time of its decision, not just “when suit was filed”).

The relevant analogy, therefore, is not to the principle of *Mollan v. Torrance* but to Congress’s power to prevent efforts to circumvent jurisdictional requirements. See, e.g., 28 U.S.C. 1359; *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969). Although Congress has not yet done so, there seems little doubt that Congress could, for example, prevent parties from defeating diversity jurisdiction by assigning a claim to a non-diverse individual in anticipation of litigation. See *Gentle v. Lamb-Weston, Inc.* 302 F. Supp. 161 (D. Me. 1969); *Grassi v. Ciba-Geigy, Ltd.*, 894 F. 2d 181 (5th Cir. 1990); *Miller v. Perry*, 456 F. 2d 63 (4th Cir. 1972). Here, similarly, Congress has prevented petitioner from defeating federal jurisdiction by actions taken in response to the notice of intent to sue.

3. The relief that CBE seeks also redresses the injury it suffered in a straightforward way: by punishing the party who inflicted the injury, and by preventing and deterring that party from inflicting any future injury on CBE and its members. Petitioner asserts that CBE is seeking to exercise “prosecutorial authority” (Pet. Br. 39). But CBE is not seeking to enforce the law against a wrongdoer chosen from the

population at large; it is seeking to punish a party whose illegal conduct directly injured CBE, and who, if it breaks the law again in the future, will injure CBE again.²⁰

a. The notion that a victim redresses a wrong and vindicates its own rights by punishing the wrongdoer—even if the victim does not materially profit from doing so—is as ancient and fundamental a notion of “redress” as can be found. This Court has, for example, specifically approved and award of nominal damages “not to exceed one dollar” to plaintiffs who suffer a violation of their rights but no compensable injury. *Carey v. Piphus*, 435 U.S. 247, 267 (1978). The purpose of such an award is to “vindicate[]” the plaintiff’s rights and to ensure that “the law recognizes the importance to organized society that those rights be scrupulously observed” (*id.* at 266). CBE, which has suffered injury, has the same interest in obtaining the vindication of its own rights. And the request for civil penalties, as well as for other forms of relief, assures that there will be far more “concrete adverseness” between the parties here than there is in a suit where only nominal damages is at stake. *Simon*, 426 U.S. at 38 n. 16, quoting *Baker*, 369 U.S. at 204.

b. In addition, Congress determined that the imposition of civil penalties on petitioner would deter petitioner from future violations of EPCRA. As we have shown, petitioner’s violations of EPCRA injured CBE and its members in precisely the way the statute is intended to prevent. Petitioner continues to conduct operations subject to EPCRA in the neighborhood where CBE’s members live and work. If petitioner violates EPCRA in the future, those violations will again directly harm CBE and its members. By deterring such violations, the civil penalties will redress future harm to CBE in the same way that an injunction would.

Deterrence in this case rests on the common sense notion that a wrongdoer who has paid a penalty is more likely to stay within the law, in the future, than a wrongdoer who has escaped punishment. It

²⁰ In this respect, this case is wholly unlike *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); here, if petitioner again violates the law, there is not just a “real and immediate threat of injury” to CBE and its members (*id.* at 103) but a virtual certainty.

is entirely reasonable for Congress to make this judgment the basis for the EPCRA citizen suit provision. Congress should be permitted "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before" (*Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring)). A determination that petitioner will be less likely to injure its neighbors in the future if it is subject to civil penalties today is precisely the "chain of causation" that Congress has "articulate[d]" here.

Indeed, Congress has made this judgment in connection not just with EPCRA but with the amendments to the citizen suit provision of the Clean Air Act, which permits citizen suits against parties who came into compliance before suit was brought: "The assessment of civil penalties for violations of the Act is necessary for deterrence, restitution, and retribution." S. Rep. No. 101-223, 101st Cong., 2d Sess. 372-75 (1989) This does not amount to saying that Congress could simply authorize any person to enforce the law against any wrongdoer: CBE will be the victim if petitioner violates the law again. By imposing penalties on petitioner, CBE is seeking to avert future injury to itself, and Congress reasonably concluded that such penalties will be an effective deterrent.

c. Finally, in this case CBE sought not just civil penalties and litigation costs but declaratory and injunctive relief against petitioner. See J.A. 11. The declaratory judgment will foreclose petitioner from engaging in unlawful conduct in the future. Cf. *Samuels v. Mackell*, 401 U.S. 66 (1971). The injunction, which would entitle CBE to inspect petitioner's facility and records, will directly deter future violations.

As we have said, under well-established principles, such a request for prospective relief cannot be defeated just because petitioner has, under threat of litigation, desisted for now from its unlawful conduct. "[P]redictable 'protestations of repentance and reform'" (*Gwaltney*, 484 U.S. at 67, quoting *Oregon State Medical Society*, 343 U.S. at 333) do not bar equitable relief unless the "defendant [can] demonstrate that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'" (*Gwaltney*, 484 U.S. at 66, quoting *Phosphate Export Assn*, 393 U.S. at 203)—a showing that petitioner cannot possibly make here.

4. The relief that CBE seeks also compensates CBE for the injury petitioner inflicted on it, in two important respects.

a. The award of litigation costs, in addition to providing CBE with a stake in the action analogous to the qui tam plaintiff's bounty, also redresses an important element of CBE's injury. Because EPCRA is an informational statute, the award of litigation costs under EPCRA does not function in the way such an award generally does. The Court has said that "[a]s a general matter," a claim for litigation costs "is not part of the merits of the action" because it "does not remedy the injury giving rise to the action" (*Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988)). But that is not the case here; here, an award of litigation costs will compensate CBE, in part, for the injury that petitioner's unlawful conduct inflicted on it. The award of litigation costs is therefore *not* "wholly unrelated to the subject matter of the litigation" (*Diamond v. Charles*, 476 U.S. 54, 70 (1986)). Petitioner's wrongful conduct kept from CBE information that CBE was entitled to receive, and as a result CBE had expend its own resources to conduct a more expensive independent investigation, piecing together from other public sources of information that should have been readily available under EPCRA. CBE's independent investigation served the very purpose of EPCRA—"to provide the public * * * with important information on the hazardous chemicals in their communities." H.R. Rep. 253, pt. 1 at 59.

If CBE prevails in this action, the costs of that investigation will be recoverable under the litigation costs provision of EPCRA. See *Public Interest Research Group of New Jersey, Inc. v. Windall*, 51 F.3d 1179, 1189 (3d Cir. 1995). As this Court explained, in interpreting the litigation costs provision of the Clean Air Act, 42 U.S.C. 7604(d)—a provision indistinguishable, for these purposes, from the EPCRA litigation costs provision—fees should be awarded for work that is "'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Delaware Valley Citizen's Council*, 478 U.S. 546, 561 (1986), quoting *Webb v. Board of Ed.*, 471 U.S. 234, 243-44 (1985). The resources CBE expended in its investigation of petitioner were not only "useful" and "ordinarily necessary" but indispensable; without that investigation CBE would have had no basis to issue its notice of intent to sue, which was of

course a jurisdictional prerequisite to this action (see *Hallstrom*, 493 U.S. at 31).

If, therefore, CBE prevails in this litigation, it will receive a sum of money that will compensate it for a significant part of the injury that petitioner inflicted on it. This is a straightforward form of "redress," plainly adequate to satisfy Article III.

b. In addition, citizen suits under EPCRA and other environmental statutes, like other litigation, often do not proceed to judgment but are settled. Under well-established EPA guidelines, those settlements—so-called Supplemental Environmental Projects (SEPs)—can provide benefits to the individuals injured by the defendant's violation of EPCRA. See Environmental Protection Agency, Interim Revised Supplemental Environmental Projects Policy, 60 Fed. Reg. 24856 (May 10, 1995). Many lower courts have approved SEPs as part of consent decrees settling citizen suits, including citizen suits under EPCRA. See, e.g., *Atlantic States Legal Foundation v. Whiting Roll-Up Door Mfg. Corp.*, 38 BNA Env't Rep. Cases 1426, 1428 (W.D.N.Y. 1994); *Atlantic States Legal Foundation v. Com-Tek*, 22 BNA Env't Rep. (Current Developments) 535 (June 28, 1991).

A SEP that resolved an EPCRA suit might, for example, provide for the defendant to take steps to reduce its use or improve its handling of toxic substances—the sort of steps the defendant might have been compelled to take, by public pressure, if it had made the disclosures required by EPCRA. Like any settlement, a SEP might not compensate the plaintiff perfectly for the injury that the defendant inflicted. But the redressability requirement does not require perfect compensation; it only requires that the prospect of redress be "likely" and not purely "speculative." The prevalence of SEPs, and their recognition by the EPA, establish the availability of this form of redress and therefore satisfy Article III.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 96-643

In The
Supreme Court of the United States
October Term, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,
vs.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

We have shown in our opening brief (Pet. Br. 14-34) that, based on EPCRA's language, EPCRA's place in federal environmental law, and the basic purposes of environmental citizen suits, Congress did not intend to authorize citizens to seek penalties for EPCRA violations that were cured before the citizen suit was filed. Respondent cannot overcome this logical conclusion to find congressional authorization for its suit. We have also shown (Pet. Br. 34-41) that respondent cannot satisfy bedrock Article III standing requirements, something that Congress cannot waive. Respondent asks this Court to discard its settled line of Article III law and find standing to sue where an environmental citizen plaintiff cannot allege an ongoing violation.

I. EPCRA'S "PLAIN LANGUAGE" DOES NOT AUTHORIZE RESPONDENT'S SUIT FOR PAST VIOLATIONS

A. Contrary to respondent's claims, Congress did not intend to authorize citizen suits for past EPCRA violations. It did not depart from its customary citizen suit model when it enacted EPCRA, and nothing in the statute or legislative history indicates Congress intended to grant citizens greater enforcement authority under EPCRA than it has under other environmental statutes.¹

Although respondent argues the starting point for the interpretation of EPCRA's citizen suit provision should be the language of the statute itself (Br. 10), it conspicuously elects not to address the restrictions on a court's jurisdiction (Pet. Br. 21-22):

¹ By claiming throughout its brief that The Steel Company "ignored" EPCRA, Br. 7-10, 19-20, 26, respondent attempts to cast petitioner as a "bad actor" out to flout our nation's environmental laws. Respondent has no basis for its allegations because they are, of course, untrue. In a study cited by respondent, Br. 2-3, the GAO found almost all non-reporting to be unintentional and concentrated among small and medium size manufacturing facilities that were simply unaware of EPCRA's requirements. *EPA's Toxic Release Inventory Is Useful but Can Be Improved*, at 51-52 (June 1991) GAO/RCED 91-121. The Steel Company, a small manufacturing company, was unaware of EPCRA's requirements when it received respondent's notice of intent to sue.

The district court shall have jurisdiction in [citizen suits] to enforce the requirement concerned *and* to impose any civil penalty provided for violation of that requirement.

42 U.S.C. § 11046(c) (emphasis added). In *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), found virtually identical language in the CWA ("to enforce such an effluent standard . . . and to apply any appropriate civil penalties," 33 U.S.C. § 1365(a)(2)) compelling in holding that Congress did not intend to authorize citizen suits for past CWA violations:

[CWA's citizen suit provision] does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referenced to in the same subsection, even in the same sentence. . . . A comparison of [the relevant CWA sections] thus supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit to enjoin or otherwise abate *an ongoing violation*.

Id. at 58-59 (emphasis added). By using the same provisions in EPCRA and the CWA, Congress demonstrated it simply did not intend to provide citizens with the same enforcement authority as the government.

B.1. Respondent argues that because Congress used the "alleged to be in violation" language when it enacted CERCLA's citizen suit provision, while using the "failure to" formulation in EPCRA, this Court should infer a major sea change behind Congress's intentions for citizen enforcement. Br. 13, citing *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994), for the proposition that CERCLA and EPCRA should be read as a single statute. First, CERCLA and EPCRA are not different sections of the same statute, but different statutes with different goals and requirements. It is therefore not surprising that Congress used different language in each and in neither used language that attempts to provide citizen jurisdiction over past violations.

Second, the Seventh Circuit's and respondent's idea that Congress used "under" as a shorthand method to incorporate all the substantive requirements of Sections 312 and 313 and subject them to citizen enforcement on the same level as government enforcement authority is highly doubtful. See Pet. App. A11, Br. 10-12.

"The word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. Immigration and Naturalization Serv.*, 502 U.S. 129, 135 (1991). One meaning of "under" is "by reason of the authority of." *Id.* Another is "required by." *Webster's Third New Int'l Dictionary* 2487 (1993). Seen in this light, especially in the context of *Gwaltney* and Congress's characterization of citizen suits as injunctive measures, the proper inference is that Congress did not intend to authorize citizen enforcement for all the substantive requirements of Sections 312 and 313, but rather intended citizens to sue for a failure to file forms "under," i.e., "required by," those sections if the failure is not cured by the time the citizen files suit. See also *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473, 475 (6th Cir. 1995).

Respondent attempts to counter this inference by arguing that if the sections' filing deadlines are not incorporated by the use of the word "under," then, under the same analysis, "filing blank forms, or forms containing information that the owner knew to be inaccurate" would likewise bar an EPCRA citizen suit. Br. 11-12. The error of respondent's argument was explained by this Court in *Gwaltney*: the language and legislative history of citizen suit provisions indicate that there must be an ongoing violation when the citizen complaint is filed. Should a party file blank forms or forms containing inaccurate information under any environmental statute (and thereby also invite a government enforcement action), the citizen can allege an ongoing violation and invoke federal court jurisdiction. For example, if a party subject to the CWA filed either blank or inaccurate Discharge Monitoring Reports after receiving a citizen's notice in an attempt to avoid a citizen suit, the citizen could allege, if not cured before the notice period expired, an ongoing violation. In enacting EPCRA, Congress made no exceptions to its model and thus did not intend to have EPCRA operate differently from the CWA or other citizen suit provisions.

2. Even respondent acknowledges the harshness of allowing citizens to exhume old and since corrected EPCRA violations and file suit, and suggests the Court need not reach the question of whether EPCRA allows such suits. Br. 16. Respondent distinguishes its action from any such "exhumation" by contrasting the notice and venue provisions and discerns a bright line by which

Congress meant to permit EPCRA citizen suits if the violation is continuing when notice is sent, but otherwise apparently intended to bar a citizen suit if the violation was corrected prior to notice.

Had Congress intended to so carefully circumscribe citizen enforcement, as respondent suggests, one would expect a clear indication to support the demarcation respondent sees. Additionally, far from helping respondent, its bright-line approach wholly undermines its principal argument, made here and below, that a party who fails to file EPCRA reports by March 1 and July 1 of each year is subject to citizen enforcement with no exceptions. For, according to respondent, EPCRA's "plain language" provides that once the reporting deadlines are missed, a party remains subject to citizen enforcement even if the failure to file is cured. Respondent's main argument thus calls for interpreting EPCRA to reach all past violations, no matter how small or remote, something very different from Congress's purpose in authorizing citizen enforcement.

3. In our opening brief, we survey the evolution of environmental citizen suits and show that Congress used the citizen suit provision it created in 1970 as a model for all other environmental citizen suits. We also point out that when Congress wants citizens to be able to sue for violations existing at the time notice is sent or for violations cured prior to notice, it does so unambiguously in two ways: Congress either authorizes citizens 1) to sue immediately upon providing notice, *see, e.g.*, 42 U.S.C. § 6972(b)(1)(A) (for hazardous waste violations); or 2) to sue for past violations even if cured prior to notice, 42 U.S.C. § 7604(a)(1) (citizen may sue a party "alleged to have violated" a requirement).² Pet. Br. 14-20. Respondent urges this Court to ignore these clear indications that Congress knows how to structure a citizen suit provision so that the notice period does not operate as an opportunity to cure and, instead, to read the ambiguous "failure to submit under" like these clear formulations in other statutes, an unsupportable interpretation. Respondent's concern that reversal of the Seventh Circuit will curtail EPCRA citizen suits thus is a matter to be addressed to

² In our opening brief, we point out the constitutional problems with the CAA formulation. Pet. Br. 41 n. 18.

Congress, for Congress, if it sees fit, can structure the notice period so that it cannot bar a citizen suit.

Had Congress wanted EPCRA's citizen suit provision to operate differently from its model, it no doubt would have so indicated either in the statute or legislative history. The Court should not assume that Congress meant to institute a substantive change without explanation. *See Ardestani*, 502 U.S. at 136-37; *see also Shaw v. Merchants Nat'l Bank*, 101 U.S. 892, 894 (1880) ("No statute is to be construed as altering the common law further than its words import.")

Respondent also seeks support for its expansive reading in this Court's recent interpretation of the Endangered Species Act's citizen suit provision. Br. 13-15, citing *Bennett v. Spear*, 117 S. Ct. 1154 (1997). Noting that the Court commented on the "remarkable breadth" of the ESA's "any person" formulation, respondent stretches the Court's holding to conclude that EPCRA's "any person" should somehow allow suits for past violations. Br. 15. The Court was addressing, however, whether Congress's use of "any person" eliminated prudential standing barriers to suits by ranchers and irrigation districts – non-traditional ESA plaintiffs – an issue that lends no support to respondent's position.

Moreover, as explained below, interpreting EPCRA to allow citizen suits for past violations would create serious constitutional problems and thus violate this Court's well-established rule that a statute should be construed to avoid constitutional questions "when it is fairly possible to do so." *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2237 (1995) (O'Connor, J., concurring). This canon of statutory construction "reflects a judicial presumption concerning the intent of the draftsmen of the language in question." *Regan v. Time, Inc.*, 468 U.S. 641, 697 (1984) (Stevens, J., concurring in part and dissenting in part). Rather than presuming that "Congress, which also has sworn to protect the Constitution, would intend to err on the side of" legislating within the bounds of the Constitution, *id.*, respondent would have this Court find that Congress intended to draft EPCRA to find citizen jurisdiction over past violations and thereby repudiate Article III's standing requirements. *See also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional

thickets in the absence of firm evidence that it courted those perils.")³

C.1. Respondent is mistaken that we argue the "only reason for a notice requirement is to permit a violator to come into compliance." Br. 17. In fact, we devote seven pages to the principle that the notice provision has *two* purposes: to prompt either voluntary compliance or government enforcement, thus obviating the need for citizen suits. Pet. Br. 14-20.⁴ Respondent is thus correct that in amending the CAA to permit suits for past violations, yet leaving the notice provision intact, Congress intended the notice provision "to have other purposes besides allowing potential defendants to cease their violations." Br. 17 (again acknowledging the Court's *Gwaltney* holding that the notice period operates as an opportunity to cure). The other purpose is to allow EPA an opportunity to decide if it wishes to exercise its enforcement discretion.

Respondent claims the notice period is also intended to serve a third purpose: to allow for settlement discussions. Br. 18. Faced with a suit to which there is no defense, however – diligent compliance after notice meaning nothing to the citizen plaintiff bent on "punishment" – a party finds itself in something far different from an arms' length negotiation. Faced with potentially ruinous penalties and a large attorney's fee award, a business

³ Respondent refuses to acknowledge this principle and thus how statutory construction is intertwined with constitutional standing: Congress is simply presumed to legislate within constitutional bounds. With this principle in mind, it is hardly surprising that, although EPCRA's "any person" formulation lacks the explicit Article III limitation Congress used in defining "any citizen" under the CWA (a person "having an interest which is or may be adversely affected," 33 U.S.C. § 1365(g)), Congress gave no indication it thought it may be departing from its customary citizen suit model to test the limits of its constitutional authority.

⁴ Respondent itself concedes that one purpose of the notice provision is to provide an opportunity to come into compliance. Br. 17 (notice period has other purposes "*besides* enabling a violator to come into compliance." (emphasis added)). Legislative history cited by amici reinforces the notion that Congress intended citizens "to provide a prod," which is what respondent's notice accomplished here. Br. of NRDC et al. 22.

invariably finds itself compelled to yield to the citizen group's demands.

Respondent also suggests the notice period might allow a prospective defendant to inform the would-be citizen plaintiff a suit would be baseless, thus avoiding litigation. Br. 18. Such a scenario begs the question of how the citizen could have sent such a notice in good faith if a suit would be baseless, a notion Congress could not have had in mind when it created the notice provision. Respondent's citation to the Federal Tort Claims Act, Br. 18, is also unavailing as that Act involves claims for personal or property injury – something far different from allegations of environmental violations – where the government obviously could not come into "compliance" after receiving notice of a claim.

2. And what should the main goal of a citizen suit be, and thus of a citizen group, but to prompt compliance? Respondent, however, asserts that if the Seventh Circuit is reversed, citizen groups will "lose much of their incentive, and financial ability" to seek EPCRA compliance. Br. 20. "Because nearly all defendants will come into compliance once they receive notice," respondent laments, EPCRA litigation will be curtailed. *Id.*

Thus, on its face, respondent's desire that businesses comply with EPCRA so that information is available to the public appears to be a poorly disguised plea to obtain attorneys' fees. For if EPCRA's goals are so important to it, should respondent not be satisfied when a party quickly comes into compliance upon receiving an EPCRA notice? And with its 30,000 members and over 180,000 contributors, J.A. 4, should respondent not gladly consider its costs of investigation money well-spent, because its efforts prompted compliance, reserving costly litigation as a last resort?⁵

⁵ Respondent states that citizens "seldom have complete access to information" about a facility's chemical use and emissions (Br. 18), and implies the citizen's burden in identifying EPCRA violators is a heavy one. But, as today's sources of information are numerous and extensive and provide citizens with a wealth of data on industrial facilities, a citizen's costs of investigation cannot be significant. A host of precise environmental reporting requirements under numerous environmental statutes other than EPCRA requires facilities to submit permit applications,

Far from being "of little or no use," Br. 12, filed reports provide valuable information to local emergency planning agencies and the public, information that would not be available had the facility remained unaware of EPCRA's requirements.

II. BECAUSE CONGRESS CANNOT LEGISLATE OUTSIDE THE BOUNDS OF THE CONSTITUTION, ARTICLE III BARS RESPONDENT'S SUIT FOR PAST VIOLATIONS

Respondent opens its standing section by stating The Steel Company's "argument on this point gives no hint of how far-reaching its claim is," asserting its suit is "authorized by an Act of Congress, and it is extremely rare for this Court to rule that Congress has exceeded the bounds of Article III." Br. 22. Despite respondent's intimation that The Steel Company's challenge to its standing is somehow remarkable, one would think it settled that Congress cannot expand constitutional standing. This Court applied that bedrock principle in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and, while acknowledging that Congress may, of course, create "legal rights, the invasion of which creates standing," *id.* at 578, the Court simply objected to Congress's eliminating the Article III injury requirement.

Respondent does not suggest the Court abandon Article III standing requirements altogether, but in arguing that this Court should allow its suit for past violations to continue, it asks this Court to engage in extraordinary judicial activism and reject its well-established line of Article III standing cases and apply mootness principles instead. It offers this novel approach because it cannot escape Article III's requirements that: 1) a citizen's alleged injury be ongoing when suit

waste generator reports, waste manifests, spill reports, chemical substance inventories, air emissions inventories, underground storage tank records, and numerous other documents. All of this information is available through Freedom of Information requests. Much of it is also available on computer databases.

is filed; and 2) its requested relief redress the alleged injury in some personal fashion.

A. Respondent Has No Article III Injury Because The Steel Company Was in Compliance with EPCRA When Respondent Filed Its Complaint

1.a. In an effort to give its standing argument historical underpinnings, respondent suggests that this Court "has consistently acknowledged the constitutionality of informer's actions, or qui tam actions. . . . This long-standing and consistent endorsement of the qui tam action is especially significant because" this Court has said Article III requires "draw their content from tradition and common understanding[s]." Br. 29, citing *Allen v. Wright*, 468 U.S. 737, 751 (1984). And since qui tam actions have been with us since the First Congress, and before that for hundreds of years in England, respondent contends that its "standing follows a fortiori from the qui tam cases." Br. 29-30.

In reality, this Court has never squarely addressed the constitutionality of qui tam statutes. *See, e.g., United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 618 (C.D. Cal. 1989). Additionally, that qui tam statutes have been in existence since the founding of our country "is not independent evidence of their constitutionality." *Id.* Many acts of the early Congresses would be held unconstitutional if they came before the Court today. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 814 n. 30 (1983) (Brennan, J., dissenting) (cautioning reliance on historical arguments and referring, among others, to law of First Congress requiring public whipping of persons convicted of certain crimes). While this Court may one day use qui tam's historical pedigree as a factor in finding such actions constitutional, history cannot save respondent's action. Because the history of the qui tam and, especially, of the environmental citizen suit, do not support its action, respondent is left with no choice but to ask this Court to rewrite its law of constitutional standing.

In addition to this Court never having addressed the issue, respondent's confidence in the constitutionality of the

qui tam action is far from universally shared. For example, the Department of Justice's Office of Legal Counsel has argued the qui tam provisions of the False Claims Act are unconstitutional. *Memorandum to Attorney General Richard Thornburgh from William P. Barr*, July 18, 1989, reprinted in *Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy*, at 161-197 (National Legal Center for the Public Interest, 1996). The OLC found little evidence of historical acceptance of qui tam actions:

A fair reading of the history of qui tam in the United States reveals it as a transitory and aberrational device that never gained a secure foothold within our constitutional structure because of its fundamental incompatibility with that structure.

Id. at 167. Far from lending support to respondent's standing argument, qui tam's "common understandings" indicate anything but a solid line of tradition, and, as shown below, respondent has a far inferior "warrant [for] invocation of federal-court jurisdiction," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), than the constitutionally suspect qui tam plaintiff.

b. Respondent also contends its suit is far removed from any effort "to transfer from the President to the courts the Chief Executive's most important Constitutional [sic] duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." Br. 23, citing *Defenders*, 504 U.S. at 577. The blending of Article II, Article III and separation-of-powers concerns are no less relevant here than in *Defenders*. See 504 U.S. at 576-78. By seeking penalties for alleged wholly past violations, for which it has no Article III standing, respondent is asking this Court to transfer to it the Executive's discretion to seek penalties for those violations. Respondent cannot, therefore, be acting on its own behalf, but instead on behalf of the government and the public at large. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (private parties have no judicially cognizable interest in procuring the enforcement of law by an administrative agency).

In *Gwaltney*, the United States recognized this troubling prospect:

Indeed, if Congress were to give private citizens untrammelled authority to seek penalties for wholly past violations – oblivious to Article III's requirement that a litigant have a personal stake in the controversy – it would intrude upon the Executive's responsibility to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, § 3) and the prosecutorial discretion inherent therein.

Brief of the United States as Amicus Curiae Supporting Affirmance at 21 n. 34, *Gwaltney*, 484 U.S. 49 (1987).⁶ Here, respondent, with the United States' support, asks that the courts be authorized "with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department,' and to become 'virtually continuing monitors of the wisdom and soundness of Executive action.' " *Defenders*, 504 U.S. at 577 (citations omitted). The question of who exercises enforcement discretion would be transferred from the executive branch to the federal courts.

2. Although respondent agrees that whether subject matter jurisdiction exists "depends on the state of things at the time of the action brought," *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring) (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154 (1824)), it initially questions whether this is a constitutional principle or one of statutory construction. Br. 34. By so doing, respondent ignores this Court's holdings that the case or controversy requirement demands that a plaintiff's injury be continuing at the time suit is filed. See *Sosna v. Iowa*, 419 U.S. 393, 402 (1974).⁷ Because Congress cannot alter Article III's requirements, see, e.g., *Raines v. Byrd*, 65 U.S.L.W. 4705, 4708 n. 3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a

⁶ Although the United States squarely addressed this issue ten years ago, it is conspicuously silent on the issue here.

⁷ Later in the same paragraph, however, respondent acknowledges "Article III requires that a case be 'an actual case or controversy' at the time of its decision, not just 'when suit was filed.' " Br. 34, citing *Honig v. Doe*, 484 U.S. 305, 317 (1988).

plaintiff who would not otherwise have standing.”), the “relevant analogy” cannot be to “Congress’s power to prevent efforts to circumvent jurisdictional requirements,” Br. 34, but must be to Article III itself.

Respondent attempts to sidestep this Court’s jurisprudence on Article III injury by concluding “It is beyond serious dispute” that The Steel Company’s alleged omissions satisfy the “injury in fact” element of the standing test. Br. 23. Nonetheless, respondent conspicuously makes no attempt to, and cannot, dispute that no injury existed at the time it filed its complaint. Pet. Br. 36. Instead, respondent refers solely to events that occurred prior to filing in an attempt to establish an injury and is forced to admit that any alleged injury was wholly past and noncontinuing: respondent “alleg[ed] a wrong *in the past*,” The Steel Company allegedly “*inflicted injury on CBE*.” Br. 23 (emphasis added).⁸ Even respondent concedes that EPCRA is best interpreted to mean that a violation ceases when a late report is filed. Br. 14 & n. 9. Respondent simply cannot point to any alleged injury existing at the time it filed its complaint, and it is thus clear beyond dispute that when The Steel Company filed its forms in May 1995, three months before respondent filed its complaint, respondent lost any Article III foundation on which it could base its suit. *See also Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 346-47 (1980) (Powell, J., dissenting)

⁸ Although irrelevant to its standing argument, respondent is mistaken that it was unable to include The Steel Company’s emissions in its most recent *Guide to Southeast Chicago’s Major Polluting Industries*. Br. 26. Respondent received The Steel Company’s EPCRA forms both during settlement discussions in May 1995 before CBE filed its complaint, and again during the litigation in October 1995, well before it finalized its *Guide*. (Although the *Guide* is not dated, the inside cover states the cover photo was taken on April 26, 1996.) Besides, the very title implies that the facilities included are guilty of some wrong. The Steel Company operates pursuant to lawfully issued permits and regulations, and thus under legal authority. If the other facilities in the *Guide* operate the same way, perhaps it should be renamed *Guide to Southeast Chicago’s Major Environmentally Compliant Industries*.

(this Court has routinely held that “a tender of full relief remedies a plaintiff’s injury and eliminates his stake in the outcome.”)⁹

Perhaps realizing the consequences of its not being able to allege an ongoing injury, respondent concludes there must be a “continuing live dispute on the merits” merely because the parties disagree as to whether The Steel Company is liable for civil penalties. Br. 30 n. 16. The requirements of Article III are not satisfied, however, because a party asks a court to declare its legal rights. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). Once The Steel Company filed its forms, there ceased to be any continuing dispute between the parties. Respondent cannot compel a court to decide a hypothetical case (how much in penalties The Steel Company should pay to the U.S. Treasury) just to secure its attorneys’ fees.

—B. Respondent Cannot Satisfy the Requirement of Redressability

1.a. Respondent’s redressability argument is extraordinary; it urges this Court to abandon its Article III standing doctrine and replace it with one of mootness. Respondent finds support for its argument in this Court’s holdings that “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” Br. 32, citing *Northeastern Florida Chapter, Associated Gen. Contractors v. Jacksonville*, 508

⁹ Respondent even claims that it still would have been injured had The Steel Company filed its forms prior to May 1995. Br. 37 (respondent had to conduct “a more expensive” investigation because of the non-filings). Respondent claims further injury because any alleged non-compliance resulted in exposure to “additional toxic chemicals.” Br. 27. Here respondent attempts to convert a reporting statute into one like RCRA, CAA, or CWA, which are intended to protect the public from actual harm.

U.S. 656, 662 (1993). Respondent does first admit the voluntary cessation principle involves litigation that has already begun and acknowledges it does not follow that there should be a judge-made "voluntary cessation" principle to permit standing. Br. 32-33. But it then offers the novel argument that since standing and mootness are both Article III doctrines, "by the same token, Article III should not be construed to bar Congress from applying a 'voluntary cessation' principle to permit standing." Br. 33.

Respondent's argument is entirely without precedent. Of necessity, respondent chooses to ignore that it must first cross the Article III threshold by showing standing before it can ever argue that The Steel Company cannot establish mootness. By reversing the constitutional order, respondent suggests there is an opportunity for Congress to circumvent Article III's standing requirements, because, according to respondent, Article III doctrines – standing, mootness, and ripeness – merge into one since they all "must, of necessity, be consistent with Article III." Br. 33. But it is beyond dispute that mootness addresses whether the discontinuation of a violation *after* suit is filed requires a dismissal, and has nothing to do with pre-complaint actions or omissions. *See, e.g., Gwaltney*, 484 U.S. at 66-67. It is also beyond dispute that Congress cannot alter Article III's requirements. *Raines*, 65 U.S.L.W. at 4708 n. 3.

Application of the voluntary cessation doctrine might make some sense in the traditional mootness context (if respondent had standing) if there was a danger The Steel Company would not file its future EPCRA forms once the litigation was dismissed. But there is no such danger. The Steel Company did not file earlier because it was *unaware* of EPCRA, not because it chose to "ignore" EPCRA, as respondent would have this Court believe. According to respondent's analysis, if it is "reasonable to expect" that a facility which comes into compliance with the CWA by investing in new equipment will not resume violating the Act "once the threat of a citizen suit abates," Br. 21, then why is it also not reasonable to expect that a company, once it becomes aware of EPCRA and invests the time and money needed to comply

with EPCRA's complex requirements, will continue to comply with EPCRA once a citizen suit is dismissed? Moreover, if it is "relatively easy to come into compliance with EPCRA on short notice," Br. 19, why does respondent repeatedly assert that The Steel Company pay penalties so that it will be deterred from "future wrongful conduct?" Br. 9, 35-36.¹⁰ Indeed, respondent's main purpose behind its action for past violations appears to be its desire that The Steel Company be "punished," Br. 23, 34-35, compliance having been relegated to a distant purpose.

b. Another of respondent's main contentions is that Congress determined Article III's redressability requirement would be satisfied by the imposition of penalties for past EPCRA violations. Br. 35-36. While Congress may have "the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," *Defenders*, 504 U.S. at 580 (Kennedy, J., concurring), Congress was silent as to any possible deterrent effect of imposing penalties for past EPCRA violations. Respondent admits as much as it cites no such congressional articulation regarding EPCRA, and, instead, cites CAA legislative history. Br. 36.¹¹ While penalties assessed for a violation continuing after a citizen suit is filed may satisfy Article III's redressability requirement in a mootness context, *see Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109 (4th Cir. 1988),

¹⁰ Respondent also misreads EPA's estimate regarding Section 313 reporting burdens by failing to include the estimated hours required for "rule familiarization" and "compliance determination," two essential tasks in filing EPCRA forms. Br. 20 n. 10. The correct estimate is therefore not 74 hours per report in the first year as claimed by respondent, but 124.5 hours as shown in our opening brief. Pet. Br. 42.

¹¹ The history stems from Congress's amendment providing for penalties in CAA citizen suits to conform the CAA to RCRA, CWA and other environmental statutes. Contrary to respondent's suggestion, however, Congress did not discuss whether penalties for past violations would satisfy Article III's redressability requirement. S. Rep. No. 101-228, 101st Cong., 2d Sess. 373, reprinted in 1990 U.S.C.C.A.N. 3385, 3756.

they cannot redress a plaintiff's injuries where there is no continuing violation.

c. Respondent also attempts to create an injury and redressability for itself by arguing that, as in *qui tam* actions, Congress provided an appropriate "incentive" to sue in the form of "costs of litigation." Br. 30-31.¹² But an EPCRA case is no different from any other; a plaintiff simply will incur some costs in determining whether it has a valid claim. Nothing in EPCRA or this Court's jurisprudence indicates that incurring pre-filing investigation costs and fees establishes an Article III injury where the plaintiff otherwise has no Article III case.

This Court has routinely held that a claim for costs and fees "is not part of the merits of the action" because it "does not remedy the injury giving rise to the action." *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). Respondent's attempts to distinguish this Court's cases on the issue are unavailing, Br. 30 n. 16, 37, because, under its analysis, an award of litigation costs and fees is never "wholly unrelated to the subject matter of the litigation." In essence, by claiming the first dollar of costs or fees it incurred established its injury, respondent wishes to eliminate the first prong of the Article III standing test. Under any fee-shifting statute, "any person," as respondent would have it, need establish only causation and redressability, having been relieved of the constitutional injury requirement.

For example, the Fair Housing Act, in part an informational statute like EPCRA, authorizes "any aggrieved person" to sue and also recover attorney's fees and costs. 42 U.S.C. § 3613(a)(1)(A), (c)(2). Under respondent's analysis, even if an injury had been fully remedied, a would-be plaintiff could

¹² Respondent also attempts to accord EPCRA some special significance in that, under EPCRA, an award of litigation costs "is made to the plaintiff, not to the attorney." Br. 30. This makes EPCRA no different from any other fee-shifting statute, including all environmental citizen suit provisions, which award fees to the prevailing "party," *see, e.g.*, 33 U.S.C. § 1365(d), 42 U.S.C. § 3613(c)(2), yet another example of how Congress used its model in enacting EPCRA.

still establish an injury because he had incurred pre-filing investigation costs, which, according to respondent, are related to the subject matter of the litigation for purposes of Article III. Br. 37. It makes no difference to respondent if the injury sued on was wholly in the past, respondent's "revised" Article III no longer requiring the traditional injury. *But see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982) (plaintiffs alleged a "continuing pattern" of unlawful racial steering and were able to establish standing).

Perhaps realizing that, since it could not allege an ongoing injury, it in turn has no Article III case, respondent pleads "[i]t would be pointless to conclude that Section 326 is unconstitutional as written, but would become constitutional if Congress provided" a bounty. Br. 31-32. While not addressing whether the *qui tam* is constitutional, this Court recently acknowledged the differences in establishing Article III standing in environmental citizen suits and *qui tam* actions. *Defenders*, 504 U.S. at 572-73 (an environmental citizen suit "is not the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff.")¹³ Respondent is not a *qui tam* plaintiff, and has no Article III injury.

2. Only ten years ago, the United States argued an environmental citizen suit plaintiff who alleges past violations cannot establish standing:

A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability. However, a citizen who brings suit simply to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to

¹³ Apparently, plaintiffs in *Defenders* did not consider respondent's argument worth mentioning and did not attempt to establish injury via ESA's fee-shifting provision.

meet Article III's requirements; the mere assessment of civil penalties, which are payable only to the Treasury, would not redress in any meaningful sense the citizen's alleged injuries.

Brief of the United States as Amicus Curiae at 21 n. 34, *Gwaltney*, 484 U.S. 49. In this case, the United States retreats from that position and now argues that even if a citizen plaintiff does not allege an ongoing violation, this Court should find the speculative possibility of *future* injury sufficient to support Article III standing. U.S. Br. 26-30 & n. 10.

The United States disputes that its position on Article III has changed. U.S. Br. 26 n. 10. In attempting to show consistency of its arguments, the United States cites a case, shortly after *Gwaltney* was decided, in which it was asked by this Court to address whether, in a CWA citizen suit, a court's imposing penalties for violations that *continued* after a complaint was filed abridged Article III's redressability requirement. Brief of the United States as Amicus Curiae at 7-14, *Simkins Indus., Inc. v. Sierra Club*, 491 U.S. 904 (1989). In *Simkins*, the plaintiff "alleged in good faith and proved a continuing violation within the meaning of *Gwaltney*." *Id.* at 7. Discussing redressability in a mootness context, the United States argued an imposition of penalties for violations existing when the complaint was filed, although cured prior to entry of judgment, did not violate Article III. More important to this case, despite how it now portrays its views on standing, the United States reiterated its *Gwaltney* position that Article III requires a citizen plaintiff to allege an ongoing violation; if there is no continuing violation, obtaining a judicial assessment of penalties cannot redress a citizen's alleged injuries. *Id.* at 13 n. 14.

In this case, however, the United States reverses course and asks the Court to erase the line that traditionally has separated pre- and post-complaint injuries and instead find that Article III's redressability requirement would be satisfied by a judicial assessment of penalties for wholly past violations. It essentially argues the mootness principles it asserted in *Simkins* are no different from the standing criteria it defended in *Gwaltney*. But the two are not the same, and the

United States' unprecedented position would require the Court to equate standing and mootness, two very different Article III doctrines.

The weakness of its argument is seen in its sole ground for distinguishing *Gwaltney* from this case: "the violation at issue cannot be said to be a nonrecurring one." U.S. Br. 26 n. 10. But its argument is disingenuous: one, respondent did not allege an ongoing violation as the *Gwaltney* plaintiff would. Two, as the United States uses the word here, *Gwaltney* would involve "recurring" violations because the plaintiff there alleged years of non-compliance with the CWA, and not a single instance, as the United States suggests. *Gwaltney*, 484 U.S. at 53 (between 1981 and 1984, defendant violated its permit over 150 times).¹⁴ Mootness simply does not apply here, and respondent's and the United States' arguments have no constitutional grounding.

3. Finally, while a scarcity of government resources may be a legitimate justification for authorizing citizen suits for past violations as a policy matter, Br. 3, U.S. Br. 21, it is insufficient to confer Article III standing on respondent. This Court has emphasized this point on numerous occasions. In

¹⁴ In asking this Court to affirm the Seventh Circuit, and, in effect, eliminate the injury and redressability requirements in the standing context, the United States also invites the unwelcome consequences of undermining the doctrines of ripeness and mootness. If there is no injury requirement, a case is always ripe and never moot. See Marshall J. Breger, *Defending Defenders*, 42 Duke L. J. 1202, 1208 (1993). Nothing would prevent courts from entertaining collusive suits and issuing advisory opinions. *Id.* Congress could also enact statutes authorizing "any person" to sue and thereby overrule this Court's decisions regarding taxpayer standing and First Amendment challenges. *Id.* at 1208-09. The United States' position on standing here is a radical departure from its arguments in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), *Allen, Defenders* and others in which it argued against expanding Article III standing. It is also passing strange that the United States argued that the plaintiffs in *Spear* did not have Article III standing where there clearly was a continuing harm, but have no difficulty finding standing here where the alleged harm is wholly past.

Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 945 (1983), this Court explained that "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." See also *Valley Forge*, 454 U.S. at 484 ("To the extent the Court of Appeals relied on a view of standing under which the Art. III burdens diminish as the 'importance' of the claim on the merits increases, we reject that notion."). Indeed, "If passionate commitment plus money for litigating were all that were necessary to open the doors of the federal courts, those courts, already overburdened with litigation of every description, might be overwhelmed." *People Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984).

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the Seventh Circuit Court of Appeals should be reversed, and the District Court's dismissal of CBE's complaint should be reinstated and affirmed.

Respectfully submitted,

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No. 96-643

In the Supreme Court of the United States

OCTOBER TERM, 1996

THE STEEL COMPANY, A/K/A CHICAGO STEEL AND
PICKLING COMPANY, PETITIONER

v.

CITIZENS FOR A BETTER ENVIRONMENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

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4094

QUESTION PRESENTED

Whether a citizen may sue to enforce the reporting requirements of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) against a defendant who violates the Act by failing to file the required reports on time, but who then files them after receiving statutory notice of the intended suit and before the complaint is filed.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-643

THE STEEL COMPANY, A/K/A CHICAGO STEEL AND
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v.

CITIZENS FOR A BETTER ENVIRONMENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

INTEREST OF THE UNITED STATES

The Environmental Protection Agency (EPA) plays the lead role in implementing and enforcing the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001 *et seq.* The present case, in which the United States appeared and argued as amicus curiae in the court of appeals, concerns the prerequisites for a private suit brought to enforce EPCRA requirements. Resolution of this case will have a direct and substantial effect on systematic enforcement of, and compliance with, the Act.

STATEMENT

1. The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 *et seq.*, protects public health, public safety, and the environment by ensuring public and official access to information on inventories and releases of hazardous and toxic

chemicals. This case involves two of EPCRA's central reporting requirements.

Section 312(a) requires covered facilities to submit annual emergency and hazardous chemical inventory forms ("inventory forms") to the State in which the facility is located, local officials, and fire departments. 42 U.S.C. 11022(a). Congress adopted that reporting requirement in part to enhance community emergency preparedness after a company's accidental release of highly toxic chemicals in Bhopal, India, killed more than 2,000 people, and after many domestic accidents. 131 Cong. Rec. 24,060 (1985) (statement of Sen. Lautenberg). During the five years preceding EPCRA's enactment, the United States experienced at least 6,928 toxic chemical accidents that, in total, killed more than 135 people, injured approximately 1,500, and forced more than 200,000 others to evacuate their homes, schools, or businesses. John L. Spilsbury, *The Hazardous Chemicals Right-to-Know Act: Letting the Public Know What's Next Door*, 64 N.C. L. Rev. 1330, 1330 (1986).

Section 313(a) of EPCRA requires covered facilities to report toxic chemical releases to the State and the Environmental Protection Agency (EPA) on an annual basis. 42 U.S.C. 11023(a). EPCRA expressly ordains that such information is of particular importance to the public. Toxic chemical release reports "are intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities." 42 U.S.C. 11023(h) (emphasis added).

EPCRA establishes strict annual deadlines for facilities to submit inventory forms and toxic chemical release forms. Prompt, regular reporting is critical to effective community emergency planning and the safety of firefighters and other emergency response officials. See 131 Cong. Rec. 24,060-24,061 (1985); *Value of EPCRA Information Proven in Fatal Explosion*, 4 Right-to-Know Planning Guide (BNA) No. 21, at 4 (July 4, 1991) (EPCRA

reporting vital in responding to explosion of fertilizer plant); *EPCRA Data Plays Major Role in Midwest Flood Response*, 6 Right-to-Know Planning Guide (BNA) No. 24, at 4 (August 12, 1993) (emergency response officials relied on EPCRA data to identify possibly hazardous conditions after 1993 midwestern floods).

EPCRA also provides for unprecedented public access to the inventory and toxic chemical release information, which must be made available to the general public at convenient locations and times. 42 U.S.C. 11044(a). Consistent with the annual reporting cycle, local emergency planning organizations must publish annual notices in local newspapers announcing that inventory forms have been received. 42 U.S.C. 11044(b). EPA must maintain a national toxic chemical inventory in a publicly accessible computer data base. 42 U.S.C. 11023(j).

EPCRA reporting provides information disclosure that is an effective and efficient supplement to traditional regulatory controls, because it "encourage[s] informed community-based environmental decision making and provide[s] a strong incentive for businesses to find their own ways of preventing pollution." President William J. Clinton, *Memorandum for the Administrator of the Environmental Protection Agency and the Heads of Executive Departments and Agencies*, 60 Fed. Reg. 41,791, 41,791 (1995); see also 42 U.S.C. 11023(h) (describing uses of toxic release inventory information). During the period that petitioner did not file EPCRA reports, total reported toxic chemical releases decreased by 43% nationwide. The fabricated metals and primary metals industries, in which petitioner operates, reduced reported toxic chemical releases by 237 million pounds and 46 million pounds, respectively. *1993 EPA Toxics Release Inventory* 173, 184 & Table 3-7, at 185 (March 1995).

2. EPCRA provides for enforcement by EPA, 42 U.S.C. 11045, by state and local governments and emergency response commissions, 42 U.S.C. 11046(a)(2), and by citizens, 42 U.S.C. 11046(a)(1). EPCRA Section 326(a)(1) author-

izes "any person" to sue "[a]n owner or operator of a facility for failure to do" certain things. 42 U.S.C. 11046(a). Among the violations actionable by citizens are an owner's or operator's failure to "[c]omplete and submit an inventory form under" Section 312(a) and an owner's or operator's failure to "[c]omplete and submit a toxic chemical release form under" Section 313(a). 42 U.S.C. 11046(a)(1). Before bringing suit, the citizen must provide 60-days notice to EPA, the State in which the facility is located, and the violator. 42 U.S.C. 11046(d)(1).

3. On March 16, 1995, respondent notified EPA, the State of Illinois, and petitioner of respondent's intention to file suit because petitioner had not submitted annual EPCRA inventory or toxic chemical release forms for more than seven years. On May 1, 1995, after receiving respondent's 60-day notice letter, petitioner submitted the overdue inventory and release forms. EPA did not bring an enforcement action against petitioner. Pet. App. A8; J.A. 18.

4. On August 7, 1995, respondent filed a complaint under EPCRA Section 326(a)(1), 42 U.S.C. 11046(a)(1). The complaint alleges that petitioner "failed to submit chemical inventory forms to the [state emergency response and local emergency planning bodies] and the appropriate fire department, on or before March 1, 1988, and annually thereafter," in violation of EPCRA Section 312, and "failed to timely submit chemical release forms to the EPA and designated state agency on or before July 1, 1988, and annually thereafter," in violation of EPCRA Section 313. J.A. 8, 10.

The complaint alleges that respondent has offices in Chicago, where petitioner's facility is located, and that its members "reside, own property, engage in recreational activities, breathe the air, and/or use areas near [petitioner's] facility." J.A. 4, 5. According to the complaint, "[respondent's] members seek, acquire and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in

their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work, and visit." J.A. 5. The complaint alleges that "[t]he safety, health, recreational, economic, aesthetic and environmental interests of [respondent's] members and their right to know about such releases have been, are being, and will be adversely affected by [petitioner's] actions in failing to file timely and required reports under EPCRA." *Ibid.*

To address these injuries, respondent's complaint seeks a declaratory judgment, civil penalties, and an injunction. The injunction is to require petitioner to permit respondent to inspect its facilities and records for EPCRA compliance for at least one year, and to require petitioner to send its EPCRA reports to respondent when they are filed for a period of at least one year. Respondent also sought an award of attorneys fees and costs. J.A. 11.

5. The district court granted petitioner's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), holding that EPCRA's citizen suit provision does not allow citizen enforcement against "historical violations of the Act." Pet. App. A24. Relying on the Sixth Circuit's decision in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (1995), the court noted that the citizens' suit provision of EPCRA authorizes suits for "failure to * * * [c]omplete and submit [required forms] under [EPCRA's substantive provisions]." Pet. App. A22. The court read that language to permit citizens' suits only for complete failures to file, not for failures to file on time. *Id.* at A22, A24. The court also stated that the 60-day notice provision would serve no purpose and EPA's enforcement discretion would be undermined if a citizen could sue for a failure to file reports that the defendant had then filed before the suit commenced. *Id.* at A23-A24.

6. The court of appeals reversed, holding that EPCRA does authorize citizens' suits against defendants who violate EPCRA's reporting requirements by submitting

untimely EPCRA forms only after receiving the citizen's 60-day notice of intention to sue. Pet. App. A1-A15. The court rejected petitioner's argument that EPCRA permits citizens' suits only in circumstances in which the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, as construed in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), permits citizens' suits. The court based its decision on key differences in the language Congress used in the CWA provisions at issue in *Gwaltney* and the EPCRA provisions at issue here.

The court noted that EPCRA authorizes citizens' suits "for failure to complete and submit" the reports "under" EPCRA's substantive provisions; the court construed "under" to mean "in accordance with the requirements of" the substantive provisions—including the requirements for annual filing by a certain date. Pet. App. A11-A12. The CWA provision at issue in *Gwaltney* does not contain the "failure to complete and submit * * * under" language.

The court of appeals also noted the use of the past tense in EPCRA's venue provision, which authorizes suits "in the district court for the district in which the alleged violation occurred," 42 U.S.C. 11046(b)(1), and therefore confirms that suit can be brought for a violation that is completed at the time suit is brought. Pet. App. A13. The CWA provision at issue in *Gwaltney* does not contain that language.

The court of appeals explained that its decision would not defeat the purpose of the EPCRA 60-day notice provision. In *Gwaltney*, this Court referred to the purpose of the CWA's 60-day notice requirement to allow violators to avoid suit by bringing themselves into compliance. See 484 U.S. at 61. The court of appeals noted that the EPCRA notice provision "gives an alleged violator a chance to correct the citizen's information if the citizen is mistaken about the existence of a violation"; it "preserves the EPA's enforcement discretion, giving the Agency a chance to take enforcement action if it chooses" and thereby preclude the citizens' suit; and it "conserves resources

by giving violators the opportunity and the incentive to enter into settlement negotiations with citizens or the EPA." Pet. App. A13-A14. The court held that, because those purposes would be served by permitting citizens' suits in cases like this, permitting such suits would "not render the [EPCRA] notice provision gratuitous." *Id.* at A13.

Finally, the court explained that if a violator could automatically preclude suit by submitting EPCRA forms after receiving a citizen's notice of intention to sue, "[t]he incentives created by the district court's interpretation would render the citizen enforcement provision virtually meaningless." Pet. App. A14. That is because, under such a regime, "citizen suits could only proceed when a violator receives notice of intent to sue and still fails to spend the minimal effort required to fill out the forms and turn them in." *Ibid.* In that situation, given the costs of "monitoring chemical use and keeping up to date on changes in EPCRA requirements" by citizens, rather than regulated industrial users, "[p]rivate enforcement * * * would undoubtedly drop off." *Id.* at A15.

SUMMARY OF ARGUMENT

1. Section 326 of EPCRA contains detailed and unambiguous requirements for a citizens' suit. 42 U.S.C. 11046. A facility owner who has not filed reports at the time citizens give notice of suit, but who files the forms thereafter, is subject to citizens' suit under EPCRA. Three provisions are of particular relevance in this respect.

First, Section 326(a)(1) provides that citizens' suits may be brought "for failure to * * * [c]omplete and submit" inventory forms or toxic chemical release forms "under" the EPCRA provisions requiring those forms. The recognized meaning of the term "under" in this context is "in accordance with." Section 326(a)(1) therefore authorizes citizens' suits against facility owners who have failed to comply with reporting requirements of Sections 312(a) and

313(a)—including the failure to submit reports at all, the submission of false or incomplete reports, or (as in this case) the submission of untimely reports.

Second, Section 326(b)(1) provides that citizens' suits "shall be brought in the district court for the district in which the alleged violation occurred." 42 U.S.C. 11046(b)(1). Therefore, a citizens' suit may be brought even when the violation has already been completed—i.e., it has "occurred"—at the time of filing of the suit.

Third, Section 326(d)(1) provides that citizens may not sue until 60 days after they have given notice of suit "to the Administrator [of EPA], the State in which the alleged violation occurs, and the alleged violator." 42 U.S.C. 11046(d)(1). The Act thus specifies that the violation has to be ongoing—i.e., it "occurs"—at the time when the 60-day notice is given. The contrast with subsection (b)(1) is telling, and determinative of the question in this case.

Because the terms of the statute are unambiguous, this Court should reject petitioner's various arguments that the statute must be interpreted to preclude a citizens' suit when the facility owner files the required EPCRA reports after having received notice of a citizens' suit but before the suit is filed. It is of little relevance that some other environmental statutes, such as the CWA, whose key provisions employ different language from EPCRA and which embody fundamentally different regulatory schemes from EPCRA, limit citizens' suits in ways in which EPCRA does not. Indeed, in the context of a reporting statute like EPCRA, authorizing citizens' suits would have been largely a futile gesture if potential defendants could avoid suit altogether by delaying their filings or otherwise failing to comply—perhaps repeatedly—until they received a citizen's notice of suit.

2. The Article III case-or-controversy requirement does not bar respondent's action for relief against petitioner, which persisted in its illegal conduct until receiving notice of respondent's intention to sue. The complaint in this case adequately alleges that respondent and its

members suffered an injury-in-fact by not having had timely access to the information that would have been available had petitioner filed its EPCRA reports as required by the statute. Because petitioner voluntarily ceased its illegal activity only after receiving the statutory notice of suit, the dispute remained alive as to petitioner's future EPCRA compliance—and the threat of future injury to respondent and its members—at the time suit was filed. Finally, the civil penalties, injunction, and declaratory judgment sought by the complaint would redress respondent's injury, because they would specifically deter future illegal conduct by petitioner that otherwise would directly injure respondent and its members.

ARGUMENT

I. EPCRA AUTHORIZES CITIZENS TO SUE PERSONS WHO FILE OVERDUE REPORTS ONLY AFTER HAVING RECEIVED NOTICE OF A CITIZEN'S INTENTION TO SUE

A. The Terms Of The Statute Authorize Citizen Suit If The Defendant Has Not Filed Required Reports When The Citizen Provides Statutory Notice of Intent To Sue, But Then Files The Overdue Reports Prior To Commencement Of The Suit

"The starting point in statutory interpretation is 'the language [of the statute] itself.'" *Ardestani v. Immigration & Naturalization Serv.*, 502 U.S. 129, 135 (1991) (alteration in original) (quoting *United States v. James*, 478 U.S. 597, 604 (1986)). EPCRA is not ambiguous. It expresses a clear congressional intent that citizens be able to enforce all the reporting requirements under EPCRA Sections 312(a) and 313(a), including the requirement that reports be filed by a date certain.

1. Section 326(a)(1) of EPCRA authorizes citizens to commence a civil action for penalties or an injunction

against a facility owner or operator for "failure to do" several things required by EPCRA, including failure to "[c]omplete and submit an inventory form under [Section 312(a)]" and failure to "[c]omplete and submit a toxic chemical release form under [Section 313(a)]." 42 U.S.C. 11046(a)(1)(A)(iii) and (iv). As the court of appeals held (Pet. App. A11), the "most natural reading of 'under'" in this context is "in accordance with the requirements of." See *Webster's Third New Int'l Dictionary* 2487 (1986) (defining "under" as "required by: in accordance with: bound by"); *Random House Dictionary of the English Language* 2059 (2d ed. 1987) (defining "under" as "in accordance with: *under the provisions of the law*"). Thus, Congress authorized citizens to enforce EPCRA against persons who fail to file reports in accordance with the various requirements of Sections 312(a) and 313(a). A failure to submit a form at all, a submission of a false or incomplete form, or a submission of a tardy form are all equally subject to citizen enforcement. Cf. *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 617 (1992) (citizens' suit provision that "incorporat[es]" a penalty provision through the use of the term "under" "must be read as encompassing all the terms of the penalty provisions").

2. EPCRA's citizens' suit provisions make clear in another way that citizens may sue for a violation that is not ongoing at the time suit is filed. Section 326(b)(1) provides that citizens' suits "shall be brought in the district court for the district in which the alleged violation occurred." 42 U.S.C. 11046(b)(1) (emphasis added). Thus, a citizens' suit may be brought even when the violation has already been completed—it has "occurred"—at the time of filing of the suit. The express language of the statute therefore establishes that at least some past violations of the statute are actionable in citizens' suits. "[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2147 (1995).

3. Finally, EPCRA's terms also make clear that not all past violations are actionable in a citizens' suit. Such a suit may be brought for violations that were ongoing at the time statutory notice is given to the defendant. Specifically, under Section 326(d)(1), "[n]o action may be commenced * * * prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator." 42 U.S.C. 11046(d)(1) (emphasis added). Just as the use of the past-tense term "occurred" in the venue provision—especially in conjunction with the "failure to * * * [c]omplete and submit * * * under" language in the earlier subsection—confirms that the violation may have been completed at the time suit is brought, use of the present-tense term "occurs" in the notice provision demonstrates that (in the context of this statute) the violation has to be ongoing at the time notice is given.

Indeed, the juxtaposition of the terms "occurs" and "occurred" in the two subsections is telling. Congress could easily have used either term in both provisions. The fact that Congress chose to use the terms that it did in each of these subsections of the same Section shows that Congress specified that citizens' suits could be brought for past violations, but that the violations must have been ongoing at the time the citizen gives notice.

B. This Court's Interpretation Of The Clean Water Act In *Gwaltney* To Preclude Similar Citizens' Suits Does Not Govern This Case

Petitioner's primary argument is that, because this Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), held that the Clean Water Act does not permit citizens' suits for violations that have been abated by the time of suit, this Court should reach the same conclusion regarding EPCRA. See Pet. 16-17, 20-24, 25-27. That argument is mistaken. This Court in *Gwaltney* specifically rejected the conten-

tion that Congress's precise choice of words should be disregarded as a "careless accident" or a "debatable lapse of syntactical precision." 484 U.S. at 57. Because the key EPCRA provisions differ significantly from the corresponding CWA provisions, Congress's choice of words in EPCRA should be given effect, just as Congress's choice of different words was given effect in *Gwaltney*. Insofar as the statutory purposes may be consulted to aid in interpretation, there are substantial differences between a reporting statute such as EPCRA and a statute primarily regulating substantive conduct such as the CWA. Those differences support the reasonableness of Congress's choice to permit citizens' suits under EPCRA—but not under the CWA—for violations that were ongoing at the time of notice but no longer ongoing by the time of suit.

1. a. The operative language regarding the scope of citizens' suits is significantly different in EPCRA and the CWA. EPCRA permits citizens' suits for "failure to * * * [c]omplete and submit an inventory form under [Section 312(a)]" and "failure to * * * [c]omplete and submit a toxic chemical release form under [Section 313(a)]." 42 U.S.C. 11046(a)(1)(A)(iii) and (iv). In comparison, the corresponding language in the CWA provides for a citizens' suit "against any person * * * who is alleged to be in violation" of certain CWA provisions. 33 U.S.C. 1365(a). "The most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation." *Gwaltney*, 484 U.S. at 57. By contrast, as the court of appeals explained in this case, the "failure to * * * [c]omplete and submit * * * under" language of EPCRA "contains no temporal limitation; 'failure to do' something can indicate a failure past or present." Pet. App. A11.

Congress's deviation in EPCRA from the CWA "to be in violation" formulation cannot properly be assumed to have been accidental. EPCRA was enacted in the same piece of legislation as the citizens' suit provisions in the Comprehensive Environmental Response, Compensation,

and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* See Pub. L. No. 99-499, Titts. II and III, 100 Stat. 1613, 1728 (1986). Yet the CERCLA citizens' suit provision, unlike EPCRA, employs the same "to be in violation" formulation as does the CWA. See 42 U.S.C. 9659(a)(1). Although petitioner would simply disregard Congress's decision to use a different formulation in EPCRA, "it is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994). By including the "failure to * * * [c]omplete and submit * * * under" formulation in EPCRA, Congress manifested its understanding that EPCRA citizen suitors need not allege the defendant "to be in violation" at the time suit is filed.

Petitioner argues (Br. 32) that the "failure to * * * complete and submit" under the formulation in Section 326 simply serves as "a reference to Section 312's inventory form and Section 313's Form R—and not a wholesale incorporation of those sections' requirements." That construction would permit citizens' suits when a covered party entirely failed to file forms or filed forms that were incomplete, while barring such suits when a covered party filed a belated form or "completed" a form by filling out every line with false—even intentionally false—information and submitting the forms to the requisite party. Petitioner offers no reason why Congress would have wanted to leave such a gaping hole in EPCRA's citizen enforcement provision, and the legislative history makes no reference to such a curious elision.¹

¹ Indeed, Congress had good reason to be especially concerned about late EPCRA reporting. Late reports are more likely to be inaccurate, since a party making a late report will likely have lower quality data available and EPCRA generally requires that reports need only be "estimates" of chemical inventories and releases. See 42 U.S.C. 11022(d)(1)(B), 11022(d)(2), 11023(g)(1)(C); see also 42 U.S.C. 11023(g)(2) (under Section 313, "the owner or operator may use readily

Moreover, petitioner's reading would make the use of "under section 312(a)" and "under section 313(a)" superfluous. The term "inventory form" has a designated meaning in EPCRA without the qualification "under Section 312," because Section 312 expressly provides that covered parties "submit an emergency and hazardous chemical inventory form (*hereafter in this chapter referred to as an 'inventory form'*)." 42 U.S.C. 11022(a)(1) (emphasis added). Similarly, the term "toxic chemical release form," although not specifically defined, plainly refers to the form required by Section 313, as Congress recognized when it used that term without express reference to Section 313 elsewhere in the statute. See 42 U.S.C. 11043(b), 11044(a). Congress thus had no need to use the qualifiers "under section 312(a)" and "under section 313(a)" merely to identify the forms at issue. Cf. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (court's "duty [is] 'to give effect, if possible, to every clause and word of a statute'"); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 311 (1829) ("[T]hese words materially affect[] the construction of the article. They cannot be rejected as surplusage."). But Congress had every reason to use those terms in order to make clear that covered parties that failed to satisfy the requirements of Sections 312(a) and 313(a) would be subject to citizens' suits.

available data" and need not conduct any additional monitoring or measurement). In addition, it may be difficult to recompile data compilations and databases—relied upon by the public, a statutory beneficiary of EPCRA, see 42 U.S.C. 11023(h)—to incorporate late reports. Third, data contained on the reporting forms are analyzed immediately by federal, state, and local officials, as well as citizens, and used in their decisionmaking. When a firm fails to meet the statutory deadlines, that violation undermines informed federal environmental policy and may cause miscalculations or errors that cannot later be rectified; the submission of information for previous years may provide no assistance at all to those who are attempting to plan for current needs, and it may endanger those, like firefighters, who rely on accurate and timely EPCRA reports. See 131 Cong. Rec. 24,060-24,061 (1985) (statement of Sen. Lautenberg).

b. The EPCRA provision authorizing suits "in the district court for the district in which the alleged violation occurred," 42 U.S.C. 11046(b)(1) (emphasis added), also differs from the corresponding CWA provision, which provides that citizens' suits "may be brought * * * only in the judicial district in which [the discharge] source is located." 33 U.S.C. 1365(c)(1) (emphasis added).² The CWA provision is an example of what this Court in *Gwaltney* termed the "undeviating use of the present tense" in the CWA, see 484 U.S. at 59, which, the Court held, virtually compels the conclusion that the discharge must be occurring at the time suit is filed. By contrast, the EPCRA provision specifically uses the past tense—"the district in which the alleged violation occurred." Congress thereby utilized in EPCRA—unlike in the CWA—language that would authorize suits (in at least some circumstances) for violations that had been abated by the time suit was filed.³

² The third EPCRA provision discussed above—providing that citizen suitors must give notice to "the State in which the alleged violation occurs," 42 U.S.C. 11046(d)(1) (emphasis added)—uses language identical to that in the corresponding CWA provision. See 33 U.S.C. 1365(b)(1)(A)(ii). There is no other EPCRA or CWA provision to suggest that that provision, read in context, has a different meaning in each statute. Accordingly, that provision has an identical meaning in each of the two statutes, requiring that the violation must be alleged to be ongoing at the time notice is given.

³ The Court in *Gwaltney* relied upon two further aspects of the CWA that differ from EPCRA in significant ways. First, the *Gwaltney* Court noted that the CWA's notice provision bars citizen suits "only if the Administrator or State has commenced an action 'to require compliance.'" 484 U.S. at 60 n.3 (quoting 33 U.S.C. 1365(b)(1)(B)). The Court cited this statutory language to support its conclusion that the "precluded [CWA] citizen suit is also an action for compliance, rather than an action solely for civil penalties for past, nonrecurring violations." *Ibid.* By contrast, EPCRA bars a citizen suit if EPA has commenced and is diligently pursuing an action "to enforce the requirement concerned or to impose a civil penalty under this Act with respect to the violation of the requirement." 42 U.S.C. 11046(e) (emphasis added). That language suggests that an EPCRA citizen suit

2. Petitioner argues (Br. 15-18, 21-24) that permitting citizens' suits for violations abated during the 60-day notice period would be inconsistent with the policies on which the citizens' suit provision is based. In *Gwaltney*, this Court noted that the CWA citizens' suit provision was intended to "give [the alleged violator] an opportunity to bring itself into complete compliance with the Act and thus * * * render unnecessary a citizen suit." 484 U.S. at 60. See also *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (RCRA). Petitioner argues (Br. 15-18) that permitting EPCRA citizens' suits for violations abated during the 60-day notice period would disserve that purpose, thereby rendering the notice period "gratuitous." See *Gwaltney*, 484 U.S. at 60.

The short answer to petitioner's argument is that, as the text of EPCRA indicates, the EPCRA citizens' suit provision is not based entirely on the purpose of the CWA provision identified by this Court in *Gwaltney*. There are at least three other purposes served by the EPCRA citizens' suit provision. Permitting citizen suits as Congress intended would in no way disserve these purposes or render the 60-day notice period gratuitous.⁴

could be brought either to enforce compliance or for civil penalties for some past violations. Second, the Court in *Gwaltney* noted the significance of the CWA's definition of "citizen" as "a person * * * having an interest which is or may be adversely affected" to be "[t]he most telling use of the present tense." 484 U.S. at 59 (quoting 33 U.S.C. 1365(g)). That "most telling use of the present tense," *ibid.*, is not present in EPCRA, which instead uses the term "person" and defines it broadly without regard to tense. See 42 U.S.C. 11049(7).

⁴ Citing *Morrison v. Olson*, 487 U.S. 654 (1988), *amicus curiae* the Washington Legal Foundation mistakenly argues (Br. 24-27) that citizens' suits for past violations of EPCRA violate separation of powers principles by "transferring a unique prosecutorial function from the Executive branch to a private citizen." The cause of action by one private person against another that EPCRA created is much narrower than the delegation of criminal and civil law enforcement authority upheld in *Morrison*. See 487 U.S. at 662 (independent counsel has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice").

a. The 60-day notice period gives the EPA, which must receive a copy of the 60-day notice, see 42 U.S.C. 11046(d)(1), an opportunity to decide whether to assume responsibility for the enforcement action, thereby ousting the citizen suitor. See 42 U.S.C. 11046(e) ("No [citizens' suit] may be commenced * * * if the Administrator [of EPA] has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty."). Cf. *Hallstrom*, 493 U.S. at 29 ("notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits"). Permitting citizens' suits for violations abated during the 60-day period is entirely consistent with that purpose.

Petitioner argues (Pet. Br. 24) that permitting such citizens' suits would threaten the government's control over enforcement, because citizens could file suit months or years later "to seek [the] penalties [that] EPA chose [in an earlier administrative proceeding] to forgo." See also *id.* at 46-47 ("Congress could not have intended to permit citizen groups to exhume past violations and then bring penalty actions.").⁵ That is incorrect. First, EPA's decision to "commence[] and * * * diligently pursu[e] an administrative order or civil action" bars any future citizens' suit. 42 U.S.C. 11046(e). There is no reason to believe that courts will be unable to administer that provision firmly to preclude abuses by citizen plaintiffs. Second, any EPA enforcement action can be expected to require, at a minimum, that the violator bring itself into compliance with EPCRA. After compliance is achieved, no

Under *amicus*'s extreme view of Article II, it is likely that all citizen suits, including suits seeking injunctive relief for ongoing violations and *qui tam* actions, would constitute an unconstitutional intrusion on the Executive's enforcement discretion.

⁵ EPA, which receives and reviews all EPCRA 60-day notice letters pursuant to 42 U.S.C. 11046(d), is not aware of any EPCRA citizen suit that has alleged only violations that wholly predate the citizens' notice letter.

citizen suitor could bring suit, because the violation would not be ongoing at the time the citizen attempts to give notice. Third, the United States retains its ability to intervene as of right in any citizens' suit. See 42 U.S.C. 11046(h)(1). Finally, after the agency has addressed the matter, EPA's views regarding the appropriate penalties would be entitled to deference.

b. The 60-day notice period also provides an opportunity for pre-litigation settlement of the case. If the prospective defendant's facility is in compliance, the facts may be brought to the attention of the citizen suitor, thus avoiding litigation entirely. If not, the prospective defendant and plaintiff may work out a settlement of the case, perhaps including safeguards to ensure that the facility does not fall out of compliance in the future. See Pet. App. A14 ("key rationale" is "to require a 'would-be champion to try negotiation before litigation'"). That, too, can avoid the need for litigation.

c. Finally, the 60-day notice period gives the prospective defendant an opportunity substantially to mitigate the penalty or other remedial measures that might be imposed if a lawsuit follows. The maximum statutory penalty of \$25,000 per violation accrues on a daily basis, see 42 U.S.C. 11045(c); the defendant can absolutely stop the accumulation of penalties by filing accurate reports even before suit is filed. More important, a key consideration in assessing penalties under most of the environmental statutes is the extent to which the defendant has made a good-faith effort to comply with the law. See, e.g., *Tull v. United States*, 481 U.S. 412, 422-423 (1987). EPA's own EPCRA penalty policies—which courts have looked to for guidance in judicial proceedings involving citizen plaintiffs, see, e.g., *Hercules, Inc. v. Student Public Interest Research Group of New Jersey, Inc.*, 29 E.R.C. 1417 (D. N.J. 1989); *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1561 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), rev'd on other grounds, 484 U.S. 49 (1987)—take this factor into account in a

number of ways.⁶ The 60-day notice period permits a defendant to take advantage of these policies immediately, thereby substantially limiting the potential penalty that may be imposed.⁷

3. Congress's decision to configure EPCRA citizens' suits slightly differently from those under the CWA makes sense. The CWA generally imposes operational

⁶ For example, EPA's penalty policy for EPCRA Section 312 provides that "any prior history of * * * violations" and "the degree of culpability * * * [must] be considered in every penalty assessment." *EPA Penalty Policy For Sections 302, 303, 304, 311, and 312 of [EPCRA] and Section 103 of [CERCLA]* at 22 (June 13, 1990); see also *id.* at 24-27. A defendant who complies quickly—such as during the 60-day notice period—after being informed of a violation of which the defendant was previously unaware will obviously benefit under these provisions. On the other hand, a defendant who delays compliance each year (or who files false or incomplete forms each year) until a citizen suitor provides notice of suit may suffer a greater penalty under these provisions. EPA has a similar penalty policy under EPCRA Section 313. See *Enforcement Response Policy for Section 313 of [EPCRA] and Section 6607 of the Pollution Prevention Act* at 14 (higher penalties for knowing violations), 16-17 (higher penalties for history of violations), 18 (lower penalties "in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance") (August 10, 1992). We have lodged copies of the two penalty policy documents cited in this footnote with the Court and have provided them to the parties.

⁷ Although Congress's amendments to the Clean Air Act in 1990 obviously do not control the interpretation of the earlier enacted EPCRA, see Pet. 17-18, we agree with the court of appeals, see Pet. App. A13, that those amendments do support the principle that permitting citizens' suits for at least some past violations is consistent with the purposes underlying the requirement that citizen suitors provide a 60-day notice of suit. That is because Congress amended the Clean Air Act to permit citizen suits against those alleged "to have violated (if there is evidence that the alleged violation has been repeated)" various statutory provisions. 42 U.S.C. 7604(a)(1). While adding that language, which permits suits for past violations, Congress left the Clean Air Act notice provision intact. See 42 U.S.C. 7604(b). Accordingly, Congress must have believed that there was no inconsistency in permitting citizens' suits for past violations but still requiring citizen suitors to provide defendants with 60 days' notice.

requirements on facilities that discharge pollutants into the nation's waters. To comply with the CWA, facilities often have to make substantial investments in new equipment or facilities, and Congress reasonably may have concluded that a company that has made such investments and come into compliance during the brief 60-day notice period will likely continue in compliance and should not face the additional sanctions that might be imposed in a citizens' suit.

EPCRA's regulatory scheme is different from that of the CWA. It requires only reports, not the installation of new facilities or equipment. We do not disagree that compliance with EPCRA's reporting requirements has costs for facilities, as petitioner and its amici emphasize. See, e.g., Pet. Br. 42-45. But Congress may have reasonably concluded that, in general, the costs of EPCRA reports would be much less than the costs of complying with the operational regulations imposed by the CWA, and covered entities would find it much easier to file overdue EPCRA reports within the 60-day notice period than to come into CWA compliance within the same period.⁸ Moreover, a facility's decision to file an EPCRA report in a given year often provides little or no assurance that it will do so in the next year, since each year's report is a separate undertaking that may often involve an entirely new effort.

In light of these characteristics of the EPCRA regulatory scheme—not shared by the CWA scheme—the court of appeals correctly discerned that permitting violators to preclude suit by curing violations during the 60-day notice period “would render the citizen enforcement provision virtually meaningless.” Pet. App. A14. An owner or

⁸ EPCRA generally requires that the reports contain only estimates of chemical inventories and releases. See note 1, *supra*. Petitioner's assertion (Br. 44) that the hasty assembly of reports would expose them to criminal liability under 18 U.S.C. 1001 is wrong. That statute criminalizes “knowing[] and willful[]” false statements. It does not criminalize inadvertent errors.

operator of an EPCRA facility might simply wait to receive a notice of citizens' suit—in a given year or every year—before filing accurate EPCRA reports. Citizens generally have no special access to information regarding potential EPCRA violators, and identifying such violators can be a costly undertaking. It will be difficult for citizen suitors to bear those costs if they can neither recoup their costs nor gain any protection through litigation against future noncompliance. By contrast, the owner or operator would have diminished incentives to incur the annual costs of gathering the information in order to file timely and accurate EPCRA reports, since the option of waiting for the notice of a citizens' suit—if it ever comes—before abating violations would be available and likely to be no more costly.

Petitioner contends that eviscerating the citizens' suit provision in this way would be tolerable, because the EPA always retains the option of enforcing the EPCRA reporting requirements itself. EPA, however, does not have the resources to uncover all EPCRA violations, including failures to file and filing of out-of-date, false, or misleading data. EPA has approximately 20 employees available to enforce EPCRA nationwide. See EPA, *Summary Of The 1998 Budget* 37 (January 1997). This small group must review compliance with and information provided under the EPCRA provisions enforceable through citizens' suits as well as those not so enforceable, see 42 U.S.C. 11002(c), 11003(d), 11021(c), 11022(e)(1), 11042(b)(1), and must identify facilities that did not report at all. For fiscal year 1995, almost 22,000 facilities filed more than 73,000 toxic chemical release forms under Section 313(a) alone. 1995 *EPA Toxics Release Inventory* at v (April 1997). According to a 1991 GAO report, another 10,000 facilities—or about one in three required by statute to do so—failed to file Section 313(a) toxic chemical release forms. General Accounting Office, *EPA's Toxic Release Inventory Is Useful but Can Be Improved* 49 (June 1991). Although similar nonreporting data for Sections 311 and 312 are

unavailable, EPA estimates that approximately 860,000 manufacturing and nonmanufacturing facilities are subject to reporting and recordkeeping requirements under Sections 311 and 312 of the Act. See 61 Fed. Reg. 51,107, 51,108 (1996).

Congress was aware of the limited enforcement resources available to EPA, and it has relied on the citizens' suit mechanism—both in EPCRA and in other important environmental statutes—to fill the gap between the number of significant environmental violations and the federal and state enforcement resources available to address such violations. See, e.g., 131 Cong. Rec. 34,650 (1985) (statement submitted by Rep. Glickman) ("In view of the government's limited and overburdened enforcement authority, citizen suits are essential to assure compliance with the law."); House Committee on Public Works and Transportation, *Superfund Amendments of 1985*, H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 5, at 83 (1985) ("Citizens [] suits provisions have been found to be helpful both in encouraging diligent Federal enforcement of environmental statutes and in locating and taking actions against violators of these Acts."); 131 Cong. Rec. 34,641 (1985) (statement of Rep. Roe) (same). Cf. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986). Citizen enforcement authority is especially appropriate under EPCRA because EPCRA is the principal means by which citizens can learn of the hazardous chemicals and toxic emissions in their communities, and because Congress established EPCRA in part specifically to inform the public about toxic releases.⁹ See, e.g., 42 U.S.C. 11023(h).

⁹ Petitioner argues (Pet. 46) that, if EPCRA citizens' suits are permitted to go forward, the "federal courts will experience a deluge of EPCRA citizen suits." In determining to permit citizens' suits, Congress has debated and ultimately rejected claims by regulated industry groups that courts would be overrun and industry unduly burdened by citizen enforcement. See, e.g., House Committee on Public Works and Transportation, *Superfund Amendments of 1985*, H.R. Rep. No. 253,

II. ARTICLE III'S CASE OR CONTROVERSY REQUIREMENT IS SATISFIED WHERE CITIZENS SEEK RELIEF AGAINST A VIOLATOR THAT CEASES ITS ILLEGAL ACTIVITY ONLY AFTER RECEIVING STATUTORY NOTICE OF THE CITIZENS' INTENTION TO SUE

Article III limits the judicial power of federal courts to "cases" or "controversies." That requirement serves both to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and "to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen*, 392 U.S. 83, 96 (1968). One aspect of the case-or-controversy requirement is the standing doctrine. To have standing, plaintiffs must show

99th Cong., 1st Sess. Pt. 5, at 83 (1985). See also *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 560 (recounting legislative history of Clean Air Act); *Friends of the Earth v. Carey*, 535 F.2d 165, 174 (2d Cir. 1976). Indeed, Congress provided for attorneys' fees to help encourage and facilitate such suits. See *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 260 & n.33, 263 (1975) ("Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation."). Moreover, there is no reason to believe that EPCRA's citizen suit provision has spawned an inordinate amount of litigation in the 11 years since it was enacted, despite the fact that aside from the Sixth Circuit's decision in *Atlantic States Legal Found., Inc. v. United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (1995) lower courts have permitted citizens' suits for violations that were corrected during the 60-day notice period. See, e.g., *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972, 980 (D. Ariz. 1997); *Idaho Sporting Congress v. Computrol, Inc.*, 952 F. Supp. 690, 691-693 (D. Idaho 1996); *Atlantic States Legal Found., Inc. v. Buffalo Envelope Co.*, 823 F. Supp. 1065, 1071 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1140-1141 (E.D. Pa. 1993); *Williams v. Leybold Technologies, Inc.*, 784 F. Supp. 765, 768 (N.D. Cal. 1992); *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 753 (W.D.N.Y. 1991).

"an injury in fact" that is "causal[ly] connect[ed]" to the challenged conduct and would "likely" be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added).

A. Respondent's complaint adequately alleges that it and its members have suffered and will suffer an "injury in fact" caused by petitioner's failure to file timely EPCRA reports. Respondent has alleged that its offices are located in Chicago and that many of its members live in the area of petitioner's facility. J.A. 4-5. The complaint also alleges that respondent uses EPCRA data to make "reports to its members and the public," J.A. 5, and that its members use EPCRA data "to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit." *Ibid.* The complaint alleges that respondent and its members "have been, are being, and will be adversely affected" by petitioner's failure to file timely EPCRA reports. *Ibid.*

Those allegations are sufficient, at this stage in the litigation, see *Defenders*, 504 U.S. at 561; *Bennett v. Spear*, 117 S. Ct. 1154, 1165 (1997) (the burden "is relatively modest at this stage of the litigation"), to establish that the statutory right of respondent and its members to EPCRA-mandated information has been impaired. The fact that respondent does not specifically allege a monetary injury is not controlling. Congress may by statute articulate interests and elevate the status of injuries that otherwise would not be sufficient for Article III purposes. See *Defenders*, 504 U.S. at 577. "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)); accord *Defenders*, 504 U.S. at 577. See also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (holding that "testers" had standing to sue persons who

provided false information in violation of the Fair Housing Act); *Akins v. Federal Election Comm'n*, 101 F.3d 731, 735-739 (D.C. Cir. 1996) (en banc) ("If a party is denied information that will help it in making a transaction * * * that party is obviously injured in fact."), cert. granted, No. 96-1590 (June 16, 1997); *Sierra Club v. Simkins Indus., Inc.*, 847 F. 2d 1109, 1112-1113 (4th Cir. 1988), (citizen plaintiffs had standing to enforce CWA reporting requirements based on the allegation that they were unable to learn the full extent of pollution in waterways near where they lived), cert. denied, 491 U.S. 904 (1989).

B. Respondent's complaint sought an order requiring petitioner to pay EPCRA civil penalties. J.A. 11. It also requested that petitioner be enjoined to permit respondent, at petitioner's expense, "to inspect [its] facilities and records for compliance with all of the provisions of EPCRA" and that petitioner provide a copy of all of its EPCRA reports to respondent for at least one year. *Ibid.* Finally, the complaint sought a declaratory judgment that petitioner had violated Sections 312 and 313 of EPCRA. *Ibid.* All three of those forms of relief would serve to redress respondent's injury, because all three would tend to prevent petitioner from continuing to violate EPCRA as future annual reports come due.

1. Civil penalties would tend to redress respondent's injury, because their imposition would make it much less likely that petitioner would continue to violate EPCRA as future annual reports come due. Without the prospect of civil penalties imposed in suits by respondent, petitioner might well decide that it would be more profitable to continue to file tardy or inaccurate EPCRA reports and await a notice of suit before abating their violation. Congress devised EPCRA's civil penalty scheme—including the enforcement of that scheme through citizens' suits—to deter just such conduct. Because imposition of civil penalties in this case would be likely to have that precise effect on petitioner, they would likely eliminate or drastically reduce the chances of future violations by petitioner

and thereby redress the grievance of respondent and its members.

In this respect, civil penalties have a deterrent effect similar to that of injunctive relief, which has always been understood to constitute appropriate redress for feared future injuries. See, e.g., *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952). Indeed, if a court sought to secure compliance with a legal requirement through the issuance of an injunction, the court would similarly rely on the threat of monetary penalties payable to the Treasury (in the form of contempt sanctions) to assure compliance with the injunction. The injunctive remedy and the civil penalty remedy thus ultimately rely on the same sort of monetary sanctions to redress the citizen's injury.¹⁰ Moreover, as this Court stated in

¹⁰ Petitioner errs in arguing (Br. 38) that "the United States agrees that a past violation cannot confer standing on an environmental citizen suit plaintiff." As we explained in a later filing in this Court shortly after *Gwaltney* was decided, our *Gwaltney* submission was that

an action brought simply to obtain a judicial assessment of civil penalties for *nonrecurring past violations* would fail to meet Article III's requirements. * * * Obviously, the United States' concern regarding standing was limited to the situation where the citizen plaintiff did not face any prospect of future injury.

88-660 U.S. Br. as *Amicus Curiae* at 13 n.14 (*Simkins Industries, Inc. v. Sierra Club*, 491 U.S. 904 (1989) (internal quotation marks omitted)). In *Simkins* itself, where the citizen plaintiff sought civil penalties for violation of a CWA reporting requirement, we stated that

[a] citizen plaintiff may directly benefit from the imposition of a civil penalty—even if he does not receive the proceeds—because the assessment, like an injunction, deters the violator from continuing the violations that prompted the plaintiff to file the suit. That benefit, which rectifies the plaintiff's injury, is sufficient to satisfy Article III's "redressability" requirement.

Id. at 9. That is the same position we are taking in this case, where the EPCRA violation at issue cannot be said to be a nonrecurring one. See pp. 27-30, *infra*. (We have provided the parties with copies of our brief in *Simkins*.)

Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975), "[I]f [violators] faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."

2. The injunctive and declaratory relief respondent seeks would also redress its grievance. An injunction requiring petitioner to permit respondent to inspect petitioner's facilities and to provide respondent with copies of its future EPCRA reports at the time they are filed would make it far easier for respondent to uncover future violations. If petitioner knew that respondent would be looking over its shoulder in that way, petitioner would have greater incentive not to violate EPCRA as future annual reports come due. Similarly, declaratory relief would specifically deter petitioner from violating EPCRA as future reports come due. Specifically, such a declaration would likely subject petitioner to increased penalties as a repeat violator if it again failed to file the required EPCRA reports. Petitioner's awareness of that prospect would add to its incentive to comply as future EPCRA reports come due, and would thereby redress respondent's injury.

C. Insofar as our argument depends on the fact that the relief sought here will redress the threat of future injury to respondent and its members, there can be no doubt that that sort of threat satisfies the "injury in fact" requirements of Article III. See, e.g., *Defenders*, 504 U.S. at 564 (threat of "imminent injury" sufficient for Article III standing). And a long and hitherto unquestioned line of cases has made clear that there is a presumption of such injury when the defendant has voluntarily ceased its illegal activity in response to litigation. Such a voluntary cessation generally "does not deprive the tribunal of power to hear and determine the case." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); accord *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). On the contrary, the voluntary

cessation of illegal activity would terminate the litigation only if the defendant shows that "subsequent events [make] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Concentrated Phosphate*, 393 U.S. at 203; *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (same); cf. *Vitek v. Jones*, 445 U.S. 480, 487 (1980). See also *W.T. Grant Co.*, 345 U.S. at 633 (defendant's burden under this standard is a "heavy one").

The question in the "voluntary cessation" cases is whether, after the defendant has ceased its illegal conduct, the plaintiff is still suffering a sufficient injury in fact to support the litigation, or whether instead the injury the plaintiff formerly suffered has been terminated by the defendant's "voluntary" behavior. Under the voluntary cessation doctrine, even the possibility that the defendant may return to its illegal conduct in these circumstances is sufficient to support the continued existence of an injury in fact, and thereby to support continued Article III jurisdiction. The reason for that presumption is to prevent defendants from manipulating their conduct to escape judicial scrutiny. "The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." *W.T. Grant Co.*, 345 U.S. at 632.

If the mere possibility of a defendant's future return to illegal conduct is sufficient to establish an Article III injury in fact in the mootness context, then Congress may grant plaintiffs who suffer that sort of injury in a given class of cases a cause of action to commence suits based on the same alleged injury.¹¹ That is because the case-or-controversy requirement "subsists through all stages of

¹¹ Although this Court has applied the voluntary cessation doctrine only in the mootness context, at least two lower courts have applied the doctrine where the voluntary cessation occurred, as here, prior to filing of the complaint, but after the defendant became aware of an investigation or impending lawsuit. See *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 833-834 (11th Cir. 1989); *Hall v. Board of Sch. Comm'rs*, 656 F.2d 999, 1000-1001 (5th Cir. 1981).

federal judicial proceedings." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Indeed, this Court has described the mootness doctrine as "standing set in a time frame," *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1069 n.22 (1997); it seeks to ensure that the case or controversy remains "alive" throughout the litigation, *Lewis*, 494 U.S. at 477.

Accordingly, there is no Article III bar to Congress's decision to base standing, in an appropriate class of cases, on the possibility that a defendant, who in response to prospective litigation has voluntarily ceased illegal activity that harmed the plaintiff, will repeat it and thereby harm the plaintiff once again in the future. Of course, if a defendant can carry its burden of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Concentrated Phosphate*, 393 U.S. at 203, then the voluntary cessation doctrine would provide no support for the plaintiff's standing in that particular case. Otherwise, however, a plaintiff may rely on Congress's creation of a statutory cause of action for plaintiffs suffering that sort of injury in fact.

That is precisely what Congress has done in fashioning the EPCRA citizens' suit provisions. As we have explained, Congress provided that a citizen may not file an EPCRA enforcement action unless the defendant was violating EPCRA and causing the citizen injury on the statutory notice date, at least 60 days prior to suit. Congress also provided, however, that the citizen may file the suit even if the defendant voluntarily ceases its illegal activity and comes into compliance after receiving the statutory notice. At that point, the citizen faces precisely the same prospect of future injury—the possibility that the defendant will return to its illegal conduct—that this Court has found sufficient to support Article III standing in its voluntary cessation cases. Accordingly, Congress

did not exceed its constitutional authority in granting a cause of action to plaintiffs in this class of cases.¹²

¹² Application of the voluntary cessation doctrine to the standing inquiry is consistent with the principle that jurisdictional facts are to be assessed at the time the complaint is filed. For example, respondent's complaint alleged that petitioner: had violated EPCRA for more than seven years; did not file required reports until threatened with penalties; and had never demonstrated the willingness or ability to meet EPCRA's statutory deadlines. Under the voluntary cessation doctrine, the facts at the time of the complaint create a presumption that petitioner would again violate the law unless sanctioned.

The general rule requiring jurisdictional facts to be assessed at the time the complaint is filed evolved in the diversity and removal jurisdiction context. See *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824); *Smith v. Sperling*, 354 U.S. 91, 93, n.1 (1957). A principal purpose of the rule was to prevent a party from manipulating a court's subject matter jurisdiction at will. See *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366-368 (7th Cir. 1993); *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991). That purpose would not be served by allowing a defendant "voluntarily" to halt illegal activity to defeat the court's jurisdiction.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted.

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In The
Supreme Court of the United States
October Term, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL
AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

**BRIEF AMICI CURIAE OF THE MID-AMERICA
LEGAL FOUNDATION, ILLINOIS
MANUFACTURERS' ASSOCIATION, PETROLEUM
MARKETERS ASSOCIATION OF AMERICA AND
WESTERN STATES PETROLEUM ASSOCIATION
IN SUPPORT OF PETITIONER**

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IDENTITY AND INTEREST OF THE AMICI CURIAE¹

Pursuant to Supreme Court Rule 37.3, the Mid-America Legal Foundation, Illinois Manufacturers' Association, Petroleum Marketers Association of America and Western States Petroleum Association respectfully submit this brief as amici curiae in support of the Petitioner, The Steel Company. The members of the amici are typically subject to the environmental reporting requirements at issue in this case. Written consent was granted by counsel for all parties and filed with the Clerk of the Court.

Amicus Mid-America Legal Foundation (MALF) was organized in 1975 as an Illinois non-profit corporation to engage in study, analysis, and legal advocacy for the benefit of the general public. MALF endeavors to address evolving concepts of law as they affect free enterprise and our democratic institutions, especially where the outcome of litigation could potentially cause disruption to our national commerce, and to provide legal representation on matters of public interest on all levels of the judicial process. MALF takes a special interest in actions that originate in or have a direct effect on the Midwest region.

Amicus Illinois Manufacturers' Association (IMA) is an Illinois not-for-profit corporation founded in 1893 and is the oldest and largest statewide manufacturing association in the United States. IMA's membership numbers

¹ Rule 37 Footnote: All counsel named on the cover contributed to the writing and editing of the Brief, with original drafts by William A. Price, general counsel, Mid-America Legal Foundation. The cost of the brief is paid for exclusively by the Mid-America Legal Foundation.

more than 4,700 Illinois manufacturing companies which employ over 80 percent of the total Illinois manufacturing work force.

Amicus the Petroleum Marketers Association of America (PMAA) is the national organization representing the nation's independent petroleum marketers. PMAA is a federation of state and regional trade associations from the 48 continental states and the District of Columbia. PMAA was formed in the early 1900's to provide an advocacy group on federal legislative and regulatory issues affecting petroleum marketers. PMAA represents over 10,000 marketers of petroleum products nationwide. Collectively, these marketers sell nearly half the gasoline, over 60 percent of the diesel fuel, and approximately 85 percent of the home heating oil consumed in the U.S. annually.

Amicus the Western States Petroleum Association (WSPA) is a trade association consisting of approximately 31 individual companies engaged in the production, refining and marketing of petroleum and petroleum products. Its members are responsible for more than 90 percent of the production of oil and gas on the Pacific coast of the United States.

SUMMARY OF ARGUMENT

If not reviewed by this Court, the Seventh Circuit decision will, in conflict with a decision by the Sixth Circuit and decisions interpreting similar provisions of cognate environmental laws by this Court, and expose businesses nationwide outside of the Sixth Circuit to the

risk of citizen suits for past violations under the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, which were cured before the citizen suit was filed. The decision of the Seventh Circuit also presents broad policy questions of concern to the amici curiae and those whose interests they represent, which only this Court can satisfactorily address.

The Court should reverse to establish the appropriate role for private citizen prosecutions for past and already cured EPCRA reporting violations. As it does so, it should consider the extensive network of government control mechanisms which limit and penalize reporting failures. Congress did not, and the Court should not, extend the activity of private prosecutors under EPCRA beyond that of assuring continued compliance. If the decision below is allowed to stand, self-auditing efforts by the huge number of companies subject to EPCRA will be discouraged.

Congress left to public prosecutors, not citizens, the discretion to pursue past violations. In many cases, a governmental agency may be satisfied that a company has come into compliance with EPCRA's complex reporting requirements, however late, and elect not to seek penalties for the past violations. The Illinois legislature has even gone so far as to require the Illinois Environmental Protection Agency to allow a party 30 days to cure an EPCRA reporting violation before initiating an enforcement action. Contrary to that pro-compliance goal, and in the absence of any congressional authority, the Seventh Circuit's decision encourages private citizen prosecutors to clog the courts by pursuing any past

EPCRA violation, however trivial, in an attempt to maximize their attorneys' fees. The Court should carefully consider the difference between public and private enforcement of past environmental violations, the policy implications in allowing citizens to sue for past violations, along with Congress's decision not to authorize citizens to sue for past EPCRA violations, and reverse the decision below.

ARGUMENT

I.

CITIZEN SUITS FOR PAST PAPERWORK VIOLATIONS ARE ONLY A SMALL PART OF THE REGULATORY PICTURE THIS COURT SHOULD CONSIDER

A. Large And Small Industrial Facilities Have Significant Reporting Burdens

The Court should consider the scope and variety of reporting burdens currently imposed by environmental statutes as it considers whether or not to set private prosecutors on the trail of organizations which cure and report past EPCRA paperwork lapses. These reporting requirements are so stringent as to make inadvertent violations a real possibility, a possibility EPCRA recognizes by providing a grace period to cure without being subject to the additional penalty of a citizen suit. A Chemical Manufacturers Association study released this year estimated that U.S. industry is required to spend over \$2.9 billion each year to prepare and submit reports under eight major environmental statutes: the Clean Air Act, Toxic Substances Control Act, Federal Insecticide,

Fungicide, and Rodenticide Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation and Liability Act, EPCRA, Clean Water Act and Safe Drinking Water Act. 2,982,052 reports were submitted in 1994 pursuant to the 37 reporting programs mandated by these laws. The United States Environmental Protection Agency (EPA) has estimated that 54,571,915 hours of workers' time are required for filling out and submitting the reports. At the EPA's estimated \$53.00/hour cost for report preparation, the regulatory burden of this 1994 paperwork preparation is more than \$2.9 billion. Pesticide and Toxic Chemical News, April 17, 1996, at 6-8. In fact, the CMA found that EPCRA's Section 313 reporting requirements are the most onerous among all environmental reporting requirements. *Id.*

The study also details the "extensive duplication" of EPA's requirements, along with those of the Occupational Safety and Health Administration and the Chemical Diversion and Trafficking Act, which have resulted in 37 different lists of chemicals with nearly 7,000 separate reporting requirements. These lists include more than 2,400 regulated chemicals and chemical categories. *Id.* Some confusion as to which reports are required, and when they are due, is both possible and probable, even if a good faith compliance effort is made by regulated industries.

Because so many reports are required from so many facilities, and because a party's good faith efforts are no defense to an EPCRA citizen prosecution, EPCRA offers citizen plaintiffs a huge number of potential litigation

targets. EPA has estimated that 866,285 industrial facilities are subject to EPCRA Section 312 reporting requirements. 60 Fed. Reg. 35201 (July 6, 1995). Approximately 30,000 facilities are required to submit Section 313 toxic release inventory forms. See General Accounting Office, *EPA's Toxic Release Inventory Is Useful But Can Be Improved*, (June 1991) GAO/RCED 91-121. Once a citizen group identifies a company which has missed a reporting deadline (a rather easy process), the company finds itself faced by two unattractive alternatives, litigation or settlement negotiations with little or no leverage.

Moreover, the burdens associated with proper reporting and regulatory compliance under EPCRA are not static, but are expanding. EPA is intent on expanding EPCRA reporting requirements and imposing ever more regulatory burdens on industry. See EPA Press Release, *EPA Moves Toward Major Expansion of Community Right-to-Know Information About Chemical Use by Industry*, Sept. 25, 1996. Recent Federal Register notices include:

- An EPA proposal to add over 6,400 facilities to the 30,000 now required to submit Section 313 toxic release inventory reports under EPCRA. The industries newly affected would include metal mining, coal mining, electric utilities, commercial hazardous waste treatment, chemical wholesalers, petroleum wholesalers, solvent recovery services, and any manufacturing facilities which receive wastes from other facilities and manage same through treatment or disposal. 61 Fed. Reg. 33588 (June 27, 1996); see also *Chemical Marketing Reporter*, Vol. 250, No. 9, August 26, 1996, at 7.

- An EPA Advance Notice of Proposed Rulemaking proposing extensive new accounting and tracking requirements and occupational exposure estimates for raw and finished materials brought to, used in, and shipped or disposed of from EPCRA reporting sites. 61 Fed. Reg. 51322 (Oct. 1, 1996).

Such reporting requirements are, of course, only part of the responsibilities associated with federal, state, and local environmental regulation. Comprehensive systems of statutes, regulations, and permits govern permissible discharge limits, required control technologies, operator certification, and a wide variety of other requirements designed to reduce or control air, water, and waste discharges. Civil and criminal sanctions may be imposed if the various mandates are violated. Government enforcement actions can and do deter companies from violating paperwork requirements because a party is always subject to government sanctions for past violations. Such enforcement obviously would remain in full force and effect if the Court agrees with the Sixth Circuit's reasoned analysis in *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473 (6th Cir. 1995), and decides that Congress intended to limit private prosecutions to those involving continuing violations.

B. Public, Instead Of Private, Control Over Prosecutorial Discretion Can Encourage Compliance.

Enforcement policy is likely to significantly influence the type and extent of voluntary compliance efforts by regulated organizations. When the Department of Justice

issued a 1991 guidance statement listing "regular internal or external compliance and management audits to evaluate, detect, prevent, and remedy circumstances such as those that led to the non-compliance" as a factor which should influence a prosecutor's decision as to whether to seek criminal sanctions against a party in violation of pollution control laws, it encouraged companies to conduct such audits. Paul G. Wallach and Dan Levin, *Using Government's Guidance to Structure a Compliance Plan*, National Law Journal, Aug. 30, 1993. Private counsel are often of two minds about such activity. On the one hand, an audit program can help in enforcement negotiation. On the other, it can provide evidence of violations which can be the basis of both government and citizen enforcement actions.

The Department of Justice has in the past expressed concern about who controls enforcement policy. DOJ testimony offered during the 1987 consideration of reauthorization of the Clean Water Act argued that the flood of private enforcement actions under the Act was coming dangerously close to producing the result Congress apparently meant to prevent - a shift of control over enforcement from the government to private parties. See Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in *Environmental Politics: Public Costs, Private Rewards* 105, 120 (Praeger Publishers 1992). Those concerns are even more relevant here because the Seventh Circuit's decision grants citizen plaintiffs the same enforcement authority as the government - a result Congress could not have intended.

Current trends in industrial activity and in governmental policy favor active and voluntary compliance assurance programs. The International Standards Organization (ISO), which creates various standards used as corporate benchmarks for quality assurance, is in the process of developing its ISO 14,000 standards series. These standards encourage companies to go beyond the letter of the law. Such efforts may require permit and technology standards negotiations, and may disclose reportable violations or previously undiscovered toxic emissions.

Companies will have reduced incentive to conduct voluntary audits, identify environmental compliance improvement opportunities, update missing paperwork or self-report environmental violations if citizen groups are allowed to use these actions as the basis for citizen suits without the company first having the opportunity to cure any reporting deficiencies. If the Court allows the Seventh Circuit's decision to stand, or if it interprets EPCRA as authorizing citizen suits for past paperwork problems, it will discourage proactive compliance on the part of U.S. industry.

C. Private Prosecutions Favor Dollar Payments, Not Compliance

Paperwork violations, unlike discharges, unpermitted emissions, nonpoint source toxic runoffs, or deliberate and concealed releases of pollutants into the environment, are relatively easy to prove. Courts have held that records compiled and submitted pursuant to

regulatory requirements constitute admissions of punishable violations. *See, e.g., Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120, 1130 (D. Md. 1985), *aff'd*, 874 F.2d 1109 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989). Private enforcement efforts have, in the past, focused on such paperwork violations, with effective bounties to the environmental community in the form of settlements containing attorney's fees at market rates (which may or may not match the actual costs incurred by the citizen organizations) and "credit projects," which may finance grants to local or regional environmental organizations, grants for land acquisition, or research activity. *See Greve, Private Enforcement*, at 109-110.

Private enforcers, under current conditions, possess enormous leverage in settlement negotiations. Violations of Sections 312 and 313 are punishable by civil penalties of up to \$25,000 per violation. Every day that a facility does not comply with the requirements of these sections is considered a separate violation. Additionally, Section 312 reports are submitted to three government agencies, 42 U.S.C. § 11022(a)(1), and Section 313 reports to two, 42 U.S.C. § 11023(a). EPA considers each agency not reported to be a separate violation so that an overlooked report is more than one violation. EPA penalty policies assess a base amount for the first day of violation determined by statutorily mandated factors, including the seriousness of the violation, the size of the violator, the quantity of toxic chemicals used, prior history of violations, the violator's "attitude," ability to pay, and other factors. This base amount is assessed for the first day of violation, and subsequent days are also penalized. *See Petition for Certiorari at A7.*

Where an enforcement agency is involved, "attitude" and the organization's history of compliance efforts is relatively easily determined. Other compliance investments, the reputation and activity of the violator, and the number and types of violations encountered may be given great weight in settlement, with future compliance assurance and prospective later permit and other negotiations between the parties always a main focus. Where a private prosecutor pursues a violation, however, similar concerns are not present. The citizen organization simply has no economic interest in settling for less than the maximum possible penalty. *See Greve, Private Enforcement*, at 109-113.

The subject case indicates the injustice of permitting private, rather than public, prosecutions. According to EPA's Section 313 policy, EPA will reduce a penalty by 30% if a party cooperates with EPA and quickly complies with reporting requirements once it is informed of the violation. EPA EPCRA Section 313 Penalty Policy (Aug. 10, 1992), at 18. The Steel Company's quick compliance would entitle it to the reduction if the EPA were bringing an action.

On the other hand, when a private prosecutor sends a notice of intent to sue, parties who do not settle quickly on the prosecuting group's terms and choose to defend their rights are likely to face increased settlement demands and increased attorney fees for citizen groups.

The Seventh Circuit was obviously mistaken that Congress intended the 60-day notice period to allow "a would-be champion to try negotiation before litigation." *Petition for Certiorari at A14* (citation omitted). To the

contrary, there is no arm's length negotiation in an EPCRA citizen action, and citizen groups use the notice period to attempt to intimidate parties into generous settlements. The Court should consider the economic incentives and motives which apply to private prosecutions, and limit their scope to no more than what Congress specifically intended.

II.

PRIVATE ACTIONS ARE LIMITED BY PUBLIC POLICIES EXPRESSED IN FEDERAL AND STATE STATUTES

A. Modern Environmental Statutes Show Congressional Concern With The Possible Abuse Of Citizen Suit Authority

The general rule of law is that unless Congress provides otherwise, parties are to bear their own attorney's fees. (*Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 510 U.S. 517, 127 L. Ed. 2d 455, on remand 1995 WL 261504, affirmed and remanded 94 F. 3d 553 (U.S. Cal. 1994).) Even when allowing attorney's fees as "fee-shifting" would be appropriate as a matter of equity, Congress has the power to circumscribe such relief. (*Hall v. Cole*, 93 S. Ct. 1943, 412 U.S. 1, 36 L. Ed. 2d 702 (U.S. N.Y. 1973).) The Court has chosen to limit such grants of fees to their clear terms. (*Alyeska Pipeline Service Company v. Wilderness Society*, 95 S. Ct. 1612, 421 U.S. 240, 44 L. Ed. 2d 141 (U.S. Dist. Col. 1975), held, Congressional utilization of the private attorneys general concept can in no sense be construed as a grant of authority to jettison the traditional rule against nonstatutory allowances of attorneys fees to the prevailing party,

and to award attorneys fees whenever courts deem the public policy furthered by a particular statute important enough to warrant an award.) Parties such as CBE, which seek their attorneys fees and costs as a part of private prosecutions, must show a clear statutory policy requiring a deviation in their case from the general rule of law.

The common law also limits authority over prosecutions and decisions not to prosecute to the state. (*Bucolo v. Adkins*, 96 S. Ct. 1086, 424 U.S. 641, 47 L.Ed. 2d 301, conformed to 332 So. 2d 25 (U.S. Fla. 1976), held, Florida follows the common law with respect to nolle prosequi, and vests in its Attorney General exclusive discretion to determine that the state is unwilling to prosecute.) Congress has, in other statutes, provided for the use of independent counsel (28 U.S.C.A. Section 594, Independent Counsel to exercise authority of Attorney General), or for private counsel. (31 U.S.C.A. Section 3718, private counsel may be used by agencies for debt collections.) Such laws retain oversight or supervision in other governmental bodies (Cf. 28 U.S.C.A. Section 595, relative to Congressional oversight with respect to Independent Counsel functions; and 31 U.S.C.A. 3718(b)(5)(A) and (B), requiring that all contracts with private counsel contain provisions permitting the Attorney General or the heads of executive, judicial, or legislative agencies which referred a matter for collection to terminate representation by private counsel, or to resolve the disputes in question, respectively.) The determination of what prosecutions are in the public interest is normally a matter for the agency in question, and not for private persons. (Cf. *Southport Petroleum Co. v. N.L.R.B.*, 62 S. Ct. 432, 315 U.S. 100, 86 L.Ed. 718, held, a contempt petition for violation of

an injunction following a determination by the National Labor Relations Board can only be instituted by the Board in the public interest.)

As Petitioner details, Congress has permitted and the Court has upheld limited private prosecutions under various federal environmental statutes. Petition for Certiorari at 8, 19-20. Commentators have noted that the legislative histories of these statutes "indicate some congressional caution about giving private parties the power to enforce regulatory statutes." Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 846 (1985). Explicit limitations on citizen suits include provisions directing fines to the U.S. Treasury, and not to citizen plaintiffs. See Greve, *Private Enforcement*, at 106. Whatever the practical results (and commentators like Mr. Greve have argued that the settlement process in citizen suits already provides a nonappropriated entitlement program for the environmental movement), it is clear that Congress can and has established a policy of limitation of private activity in and profit from environmental enforcement action. In *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), this Court noted that:

If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of state authorities. Respondents' interpretation of the scope of citizen suit would change the nature of the citizen's role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

The same concerns that this Court had with citizen suits for past Clean Water Act violations are present in EPCRA actions. Citizen plaintiffs should not be permitted to file suit for past violations that EPA chose to resolve with little or no penalty. The Court should determine whether the concerns it had regarding the proper application of the Clean Water Act in *Gwaltney* should also apply to private prosecutions under EPCRA.

B. Congress Did Not Choose To Permit Citizen Suits For Past Violations Of EPCRA

Respondents below suggested, and the Seventh Circuit agreed, that Congress's inclusion of a 60-day notice period, along with explicit permission for citizen suits for some past violations, in the Clean Air Act Amendments of 1990, 42 U.S.C. § 7604(a), means that a court should hold that citizens should be able to sue for past EPCRA violations even without such explicit permission. Petition for Certiorari at A13. Leaving aside the constitutional question of citizen standing to sue for past violations even with such explicit permission, Petition for Certiorari at 16-19, the legal argument suggested is inconsistent with ordinary principles of statutory interpretation. The first question is, of course, whether an amendment to a statute on a different subject (Clean Air) would have any effect on one concerned with emergency planning. Absent any explicit cross-reference, or specific repeal, the usual principle of common law, that the law does not favor repeal or amendment of an older statute by a newer one by mere implication, applies. See, e.g., *United States v. Fausto*, 484 U.S. 439, 453 (1988). This Court decided early

that repeal or amendment by implication is possible only if it arises out of a clear repugnancy between two laws, and that the newer law abrogates the older only to the extent that it is inconsistent and irreconcilable with it. *Chew Heong v. United States*, 112 U.S. 535, 549 (1884); *Wood v. United States*, 16 Pet. 342, 362-63, 10 L. Ed. 987, 995 (1842).

No amendment by implication is possible here. Congress could have chosen to amend all environmental statutes to explicitly permit suits for past violations after this Court's *Gwaltney* decision. It did not do so. It could, and did, insert explicit permission for suits for some past violations in the Clean Air Act Amendments of 1990. Absent such explicit permission, the 60-day notice requirement of EPCRA should be given the meaning intended by Congress and consistent with the Court's analysis of identical language in the Clean Water Act in *Gwaltney*. The Seventh Circuit should be directed to conform its interpretation to that of the Court, and of Congress.

C. Illinois Law Favors Self-Reporting And Efforts To Come Into Compliance, Not Paperwork Prosecutions

If the Court decides that federal law permits private enforcement even when a paperwork violation has been cured and despite a 60-day notice period, it will ignore the policy implications of recent Illinois law. The Illinois General Assembly recognized the purpose of reporting statutes to be compliance. Given the real possibility of inadvertent violations, it decided the best way to insure

compliance is through a grace period to cure without violators being subject to the additional penalty of citizen suits. The General Assembly amended the Illinois Environmental Protection Act to require the Illinois EPA to give a party 30 days' opportunity to bring EPCRA paperwork into compliance. 415 ILCS 5/25b-6, eff. Jan. 1, 1994. The Illinois legislature has not provided a similar grace period if actual harm to the environment such as contamination of the air, water, or land is involved. As a matter of public policy, private prosecutors should not be given more opportunity to enforce EPCRA than the State of Illinois chooses to permit itself.

CONCLUSION

A careful limitation of citizen prosecutions to instances where significant or continuing harm to the public is likely is a rational choice, and serves important public policy interests. Petitioner has suggested that Congress intended such a limitation in 42 U.S.C. § 11046, a position the Sixth Circuit has endorsed. The Court should overrule the Seventh Circuit and restore the appropriate interpretation.

Respectfully submitted,

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Supreme Court, U. S.

F I L E D

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No. 96-643

CLERK

IN THE
Supreme Court Of The United States

OCTOBER TERM, 1996

**THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,**
Petitioner,

VS.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF THE CHEMICAL MANUFACTURERS ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF THE PETITIONER

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BRIEF OF THE CHEMICAL MANUFACTURERS ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF THE PETITIONER

Interest of *Amicus Curiae*

The Chemical Manufacturers Association (CMA) is a non-profit trade association whose member companies account for more than 90% of the U.S. productive capacity for basic industrial chemicals.¹ The U.S. chemical industry

¹ Pursuant to Supreme Court Rule 37, the written consent of the parties to CMA's *Amicus* brief were obtained and are on file in the Clerk's Office. Additionally, pursuant to Rule 37, this brief was prepared and paid for in its entirety by CMA.

is the industry most affected by the reporting requirements of the Emergency Planning and Community Right-to-Know Act (EPCRA).

The two provisions at issue in this case are sections 312 and 313 of EPCRA. Section 312 requires certain facilities to submit inventory forms annually to state and local agencies providing information regarding the amount and location of "hazardous chemicals" at the facilities during the previous year. Section 313 requires certain facilities using any of 651 specified "toxic chemicals" to submit forms to EPA annually providing information about the amount of the chemicals present at the facilities and their routine emissions during the previous year. This is called the Toxic Release Inventory or the TRI. 42 U.S.C. §§11023(a), (g).

The vast majority of chemicals produced by CMA's member companies -- roughly 85% by volume -- are subject to the TRI reporting requirements of EPCRA section 313.² These chemicals are the core of virtually every product people use or consume in the United States, from pharmaceuticals and medical supplies to computers, electronics, and the Internet. These chemicals are essential to the U.S. and global economies.³

If this Court upholds the decision of the court of appeals in this case, it will have enormous, adverse consequences for the chemical industry and will pose equally significant problems for numerous other businesses, large and small alike. Further, this decision will impose an excessive and

² This percentage includes those chemicals that are used as a component or catalyst in production.

³ The chemical and allied products industry employs over 1 million workers (8.9% of whom are scientists and engineers); produces 1.9% of the U.S. Gross Domestic Product; and during the ten-year period 1986-1995 was responsible for a cumulative trade surplus of \$153 billion.

unnecessary burden on the federal courts. This Court should consider these repercussions as it undertakes its analysis of the legal issues presented.

Statement

CMA and its members are staunch supporters of the public's right-to-know of the environmental and health risks they face in their communities. CMA is an equally committed supporter of EPCRA and the Pollution Prevention Act of 1990 (PPA), which amended EPCRA. 42 U.S.C. §§ 13101 *et. seq.* In fact, CMA relies upon TRI data generated under EPCRA as the performance measure for the Responsible Care® Pollution Prevention Code, a chemical industry initiative promoting continuous improvement in waste reduction. Accordingly, CMA firmly believes that effective enforcement of EPCRA is vital.

However, the decision in this case does not promote the effective enforcement of EPCRA. The Seventh Circuit's analysis was blurred by two important misunderstandings. Most fundamentally, the court seriously underestimated EPCRA's reporting complexities. Secondly, the court exaggerated the significance of costs incurred by citizen groups in ferreting out facilities that fail to comply with EPCRA's reporting requirements. Pet. App. A14-A15. These misperceptions interfered with the Court's interpretation of EPCRA's citizen suit provision, resulting in a decision that improperly imposes civil penalties on a diverse group of businesses, most of which are trying diligently to comply with EPCRA's complicated and ever-changing reporting requirements. EPCRA's reporting complexities are substantial, imposing obligations of a magnitude far more burdensome than the minimal costs incurred by citizen groups investigating EPCRA violations. The discussion below describes these reporting difficulties,

as well as the sweeping and unfair consequences posed by the decision in this case.

1. EPCRA Reporting Requirements Are Highly Complex

Several factors make EPCRA's reporting requirements considerably more complicated than the court of appeals assumed.

a. Chemical Listings Are In Flux

EPCRA's reporting requirements are triggered by the presence of certain quantities of specific chemicals. Each reporting requirement is linked to a particular list of chemicals. These lists of "toxic," "hazardous," and "extremely hazardous" substances are in a state of flux -- additions and deletions to these lists are made regularly by EPA. For example, when EPCRA was enacted in 1986, Congress placed 309 individual chemicals and 20 chemical categories on the TRI list. There are now 651 chemicals and 28 chemical categories on this list. Therefore, a company that properly determines that it is not currently subject to EPCRA's reporting requirements could face significant liability if it inadvertently fails to note a subsequent change in the chemical lists. See General Accounting Office, *EPA's Toxic Release Inventory Is Useful But Can Be Improved*, GAO/RCED 91-121 (June 1991). Under this decision, each and every facility caught unaware of a sudden change in EPCRA's chemical lists is subject to a citizen suit even after it rectifies all errors during the 60-day notice period.

b. EPCRA's Reporting Requirements Are Comprehensive And Demanding

TRI reporting requires certain manufacturing and processing facilities that use more than 10,000 pounds of a

toxic chemical, or that manufacture, import, or process more than 25,000 pounds of a toxic chemical, to complete and submit a Form R. Once reporting is triggered, a facility must estimate all releases of the reportable substances during normal operations, i.e., all releases to land, underground injection, discharges to water, point source air emissions and non-point source air emissions. 42 U.S.C. §11023.

Not only must facilities estimate all releases for any given chemical, they also must complete and submit a separate Form R for each and every chemical at the facility that falls within the reporting parameters noted above. Since chemicals are the chemical industry's business, it is not uncommon for a facility of one of CMA's larger member companies to handle as many as 88 chemicals or chemical categories that are subject to TRI reporting requirements in any given year. EPA, *1994 Toxics Release Inventory Public Release Data*, at 36. These reporting requirements involve sophisticated engineering calculations that frequently require significant technical expertise to complete the Form Rs. See EPA, *Toxic Chemical Release Inventory Reporting Form R and Instructions, Revised 1995 Version*, at 28-35.⁴

Thus, contrary to the Seventh Circuit's conclusion that "the cost of compliance . . . is low[, requiring] little additional effort,"⁵ considerable effort and expense is required to comply with EPCRA's reporting requirements. In fact, EPA estimates that the reporting burden is more than one full work week per facility for just one listed chemical. Pesticide & Toxic Chemical News, *CMA Survey Notes TRI Paperwork as Most Onerous*, 6, at 6-8, (April 17, 1996). How does this translate into dollars? Using EPA estimates

⁴ Eleven copies of the *Toxic Chemical Release Inventory Reporting Form R and Instructions, Revised 1995 Version* have been lodged with the Clerk of the Court for the Court's convenience.

⁵ Pet. App. A14-A15.

once again, TRI reporting costs for 1993 - 1996 totaled almost \$1 billion.⁶

Under the decision below, every facility that innocently miscalculates a routine release (either by under- or overestimating) for a reportable substance, despite its diligent efforts, is subject to a citizen suit even after it corrects the miscalculation during the 60-day notice period.

c. EPCRA's Reporting Instructions Are Lengthy, Revised Constantly, And Subject To Variable, But Legally Enforceable, Agency Interpretations

Although the TRI reporting form is a mere 9 pages long, it should not be confused with the 1040 EZ tax form. The sheer length of the reporting instructions -- 58 pages *plus* 3 tables *plus* 8 appendices -- demonstrates the complexity of the reporting process. See EPA, *Toxic Chemical Release Inventory Reporting Form R and Instructions, Revised 1995 Version*. A glance at "Example 9: Calculating Releases and Transfers" on page 34 of the instructions, or any other example or significant instruction, confirms the complexity of the reporting requirements. And, confusing the reporting process even further, EPA has revised the reporting instructions *every year* since EPCRA's inception. In short, EPCRA reporting is never routine.

Exacerbating an already arduous process, EPA enforces interpretations of reporting obligations that it has never made public in regulations or other EPCRA publications. For example, in 1994, EPA brought an administrative action against a CMA member company alleging that it had not complied with EPCRA reporting requirements for 1988

⁶ Industry figures are higher than those of EPA, both in reporting burden and cost. CMA, *Environmental Paperwork: A Baseline for Evaluating EPA's Paperwork Reduction Efforts*, 8-9 (April 3, 1996).

through 1992. EPA claimed that the company failed to report a TRI-listed chemical that was produced during a transitory chemical reaction, i.e., where, for a *fleeting moment* during a chemical process, a TRI-listed chemical was created and then converted to a different chemical *not* subject to TRI reporting.⁷ This transitory chemical reaction was not addressed in the Form R instructions or any other regulation or publication pertaining to EPCRA. See Letter from CMA to EPA re: *EPCRA Section 313 Reporting: Transient Reaction Chemistry* (Sept. 16, 1994), App. A1-A6. Although EPA's interpretation had never been addressed in EPA guidance documents, the enforcement action resulted in a fine and a consent agreement. See Consent Agreement, App. A11.

Under the decision below, every facility that interprets the Form R instructions (which change every year) in a manner inconsistent with EPA's interpretation of the requirements (whether published or not) will remain subject to a citizen suit even after the facility complies with EPA's interpretation during the 60-day notice period. In fact, under this decision, even a facility that complies with an EPA interpretation *before* ever receiving a citizen suit notice is still subject to a citizen suit.

2. EPA Intends To Expand The Scope Of The TRI Reporting Requirements

EPA has announced its plans to expand the TRI reporting requirements. This expansion -- embracing new industries and adding more complicated reporting obligations -- promises to transform EPCRA's already complex reporting system into a compliance labyrinth. EPA's recent proposals

⁷ A simple example is the manufacture of Trichloro X, where the basic chemistry of the chlorinating sequence is monochloro X to *dichloro X* to trichloro X, where *dichloro X* is an EPCRA 313-listed chemical.

include two distinct expansions. The first, announced on April 22, 1997, adds seven new industry sectors (including many small businesses), and makes other significant changes affecting many facilities already subject to EPCRA's reporting requirements. The second expansion, due to be final in November 1997, proposes to add occupational demographics and detailed tracking of chemical use in products (i.e., materials use accounting) to TRI reporting. TRI's interpretive complexities will balloon if materials use accounting is adopted. At a minimum, collecting and reporting will require each facility to interpret the rule; identify the covered chemicals; identify and separate chemicals in mixture streams; design and implement appropriate information management systems; and train personnel, not to mention the laborious steps necessary to track chemical use for each chemical affected. See CMA, *Comments to EPA on ANPRM on TRI Phase 3: Materials Accounting*, 64-69 (February 14, 1997). Companies and businesses are certain to confront authentic compliance problems despite their very best intentions.

Even EPA officials recognize that these changes will result in errors, publicly stating:

*This is not unusual. People learn by doing. [T]he Agency is developing guidance to ease reporting for these groups, which are expected to have unique compliance problems.*⁸

The frequency of innocent errors should not be underestimated. Under EPCRA's current reporting complexities, it is not at all uncommon for medium-to-large-

⁸ *Toxic Release Inventory Expansion Rule Still Undergoing Budget Office Review*, Daily Report for Executives (BNA) Vol. 42, at A22 (March 4, 1997). (Emphasis added).

size CMA member companies to make anywhere from 10 to 15 corrections per year to past TRI filings. Technically, those companies are out of compliance. Under the holding in this case, each and every one of those companies is subject to a citizen suit for each and every inaccurate report even after it comes into compliance during the 60-day notice period.

3. The Decision Of The Seventh Circuit Will Discourage Voluntary Audits And Reporting Corrections, And Will Excessively Burden The Federal Courts

Amicus and its member companies are committed to the goals of the public's right-to-know embodied in EPCRA. Accordingly, CMA members will continue to revise past EPCRA filings to correct errors or reflect changed interpretations despite the inevitably unfair and costly consequences resulting from the decision in this case.⁹ However, many businesses, particularly smaller ones, are far less financially capable of withstanding the potential flurry of citizen suits that will follow if the ruling below is not reversed. Under this decision, correcting an erroneous filing will *increase* liability rather than limit it. This perverse disincentive can only discourage regulated entities from voluntarily seeking out and correcting TRI reporting errors. CMA and its members are deeply troubled by this result, which undermines the voluntary compliance goals and objectives of EPA and Congress.

4. The Seventh Circuit Seriously Overestimated The Costs To Citizens Enforcing EPCRA

Even if the costs incurred by citizens were an appropriate inquiry for the court, the Seventh Circuit incorrectly

⁹ Every correction made to a past filing is in essence an admission of having been out of compliance. Such an admission is all that a citizen will require to sue for civil penalties.

determined that if citizens could not sue when a violator came into compliance during the 60-day notice period, "citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. Put simply, if citizens can't sue, they can't recover the costs of their efforts." Pet. App. A14. However, Congress intended the 60-day notice period to compel compliance. Congress was concerned that citizens recoup their costs *only* if the violator or the government did not act during the 60-day notice period and the citizen was forced to litigate. Moreover, contrary to the Seventh Circuit's assessment, public access to EPCRA reporting information is widely available on CD ROM and the Internet, and thus the cost of monitoring companies subject to EPCRA requirements is truly minor.

SUMMARY OF ARGUMENT

The Seventh Circuit distorted the plain language of EPCRA's citizen suit provision, striking from the statute a critical purpose of the 60-day notice requirement: to provide an alleged violator with notice of a violation so that it can bring itself into compliance *without* the need for litigation. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). Under this decision, the *only* time a citizen suit can ever be barred under EPCRA is when the government brings an action first.

Not only did the Seventh Circuit err in its analysis of EPCRA's citizen suit provision, but allowing CBE's case to proceed raises serious Constitutional questions about CBE's standing to sue for corrected EPCRA violations. CBE failed to set forth clear and specific facts demonstrating that it suffered actual or threatened harm. More importantly, any harm that may have been suffered was redressed when The Steel Company filed all of its EPCRA reports during the 60-

day notice period *before* CBE filed its complaint. Accordingly, the Court should construe the citizen suit provision in EPCRA narrowly to avoid the significant Article III issue that would otherwise arise.

ARGUMENT

CONGRESS DID NOT AUTHORIZE CITIZEN SUITS FOR EPCRA VIOLATIONS CORRECTED DURING THE 60-DAY NOTICE PERIOD

EPCRA's citizen suit provision provides that any person may bring a civil action against an owner or operator of a facility "for failure to . . . complete and submit" inventory forms "under" section 312 or toxic chemical release forms "under" section 313 of the act. 42 U.S.C. § 11046(a)(1). However, a citizen must first give notice of the "alleged violation" to EPA, the State in which the "alleged violation occurs," and the alleged violator 60 days before filing suit. *Id.* at §11046(d)(1). The purpose of this requisite notice prior to filing a citizen suit is to provide the government with the opportunity to enforce EPCRA's requirements, and to allow the violator the opportunity to comply in order to avoid litigation. In either event, a citizen suit should be barred. *Gwaltney*, 484 U.S. at 60.

The Seventh Circuit incorrectly determined that EPCRA authorizes citizen suits for violations corrected during the 60-day notice period based on two erroneous findings. First, the court concluded that the statutory language, "failure to," indicates either a past or present failure and, therefore, is not limited to ongoing violations as this Court held was the case under the Clean Water Act in *Gwaltney*. Pet. App. A13. Second, the court concluded that the most natural reading of

the word "under" in reference to sections 312 and 313 in the citizen suit provision is "in accordance with the requirements of the referenced sections." *Id.* Therefore, because sections 312 and 313 require that the reports be submitted by specific dates, the court determined that EPCRA must authorize citizens to enforce timely compliance with its requirements. The court stated that any other interpretation "would render gratuitous the compliance dates" *Id.*

Although the Seventh Circuit began its analysis properly by looking for the "plain and ordinary meaning" of the specific language in question, the court's efforts unquestionably derailed as it failed to follow other well-established principles of statutory construction, resulting in a seriously flawed ruling. "Statutory interpretation is a holistic endeavor." *United Savings Association v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988). Courts must look to "the particular statutory language at issue, as well as the language and design of the statute as a whole -- to its object and policy" when searching for the plain and ordinary meaning of a statute. *Crandon v. U.S.*, 494 U.S. 152, 158 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). To interpret the citizen suit provision most plausibly, a court must read it in relation to the statute's other, equally relevant provisions. Otherwise, the court will fail to give full effect to EPCRA's overall objective. *Gwaltney*, 484 U.S. at 57.

The Seventh Circuit failed to consider the significance of two crucial provisions in EPCRA. First, it ignored the 60-day notice provision and with it the purpose of citizen suit provisions generally. *Notice by Citizen Plaintiffs in Environmental Litigation*, 79 MICH. L. REV. 299, 301-307 (1980). Second, it disregarded a provision barring citizen suits when the government acts only to enforce compliance and not to obtain civil penalties. 42 U.S.C. §11046(e). In so

doing, the court entirely misconstrued the plain and ordinary meaning of the citizen suit provision.

A. The 60-Day Notice Provision And The Purpose Of Citizen Suits

Congress intended that citizen suits supplement government enforcement. *Gwaltney*, 484 U.S. at 60. By requiring citizens to comply with the 60-day notice provision, Congress allows government agencies to enforce the environmental laws without the need for a citizen suit. *Id.* at 59-60. "In many cases, an agency may be able to compel compliance through administrative action, thus eliminating the need for any access to the courts." *Id.* at 60. Similarly, notice gives the alleged violator "an opportunity to bring itself into compliance . . . and likewise" obviate the need for a citizen suit. *Id.* Congress believed that the threat of suit would trigger agency enforcement and encourage violators to comply without overburdening the courts with citizen suits. *See Notice by Citizen Plaintiffs in Environmental Litigation*, *supra*, at 304-307. As the facts of this case well illustrate, the 60-day notice requirement achieves that objective.¹⁰

¹⁰ *See also Hallstrom v. Tillamook County*, 493 U.S. 18, 24, 28 (1989), (stating that EPCRA's citizen suit provision was modeled after the Clean Air Amendments of 1970); Hearings on S. 3229, S. 3466 & S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. (1970) at 1184 (statement of Douglas M. Head, Minnesota Attorney General): "The one danger . . . is the multiplicity of suits that would override compliance agreement already entered into by the [Minnesota] Pollution Control Agency so that I believe that citizens should be very carefully correlated with the present enforcement provision so that we do not unnecessarily duplicate the enforcement of the law and that we do not unnecessarily clog up the course where we are in fact making very swift efforts to enforce."

By allowing a citizen suit to proceed even if a company comes into compliance during the 60-day notice period, the Seventh Circuit's decision totally defeats a primary purpose of the provision, striking it from the statute altogether. No longer is any purpose served by providing the violator with notice of the violation and the intent to sue. Under the decision below, the *only* time a citizen suit can ever be barred under EPCRA is when the government takes action. This result is certain to flood the federal courts with unnecessary citizen suits. Clearly, this was not the intent of Congress. If it had been, Congress would not have required citizens to notify violators of their intent to sue. Alternatively, Congress would have expressly provided for litigation regardless of compliance. The court's analysis simply defies logic and the unambiguous purpose of the statute.

In a rather curious statement, the Seventh Circuit states that the logic underlying this portion of the citizen suit notice provision:

is no longer as compelling as it was when *Gwaltney* was decided. Since then, Congress has expressly intended precisely [that citizen suits should lie for past violations]. The Clean Air Act . . . contains a notice provision just like the one in the Clean Water Act. In 1990 Congress amended the Clean Air Act to permit citizen enforcement actions for past violations, yet left the notice provision intact.

Pet. App. A13.

What the court failed to recognize is that (1) the Clean Air Act Amendment permits citizen enforcement of past violations *only* when they are *repeated* violations,¹¹ and (2) the amendment has absolutely no effect on EPCRA or any statute other than the Clean Air Act. Indeed, the Clean Air Act Amendments argue forcefully against the ruling below. They demonstrate that Congress knows precisely how to craft a notice provision that permits a citizen suit to go forward in the face of compliance. The fact that Congress chose not to amend EPCRA in a comparable fashion reveals that it is not a statute where citizens should proceed against companies after they have come into compliance during the 60-day notice period.

An equally formidable effect of the decision below is the enormous burden it will impose on the federal courts. With the addition of seven new industry sectors to the 461 industries already subject to EPCRA's increasingly complex reporting requirements, as well as the addition of chemical use reporting, the burden could be staggering. See EPA, *Toxic Chemical Release Inventory Reporting Form R and Instructions Revised 1995 Version*, Table I. This result is completely at odds with Congressional intent to strike a balance between encouraging citizen suits and avoiding an excessive and unnecessary burden on the federal courts after compliance has been achieved.

B. Citizen Suits Prohibited When EPA Seeks Only Compliance

A second EPCRA provision ignored by the Seventh Circuit provides that a citizen may not sue where EPA has brought and is diligently prosecuting either an administrative order or a civil action "to enforce the requirement concerned or to impose a civil penalty . . ." 42 U.S.C. §11046(e).

¹¹ 42 U.S.C. § 7604(a)(1).

Congress was clearly satisfied that compliance alone -- without civil penalties being imposed -- was sufficient to bar citizen suits when compliance is sought by EPA (the primary enforcement authority for EPCRA violations). EPCRA does not contain any language suggesting Congress was not also equally satisfied that compliance alone should bar a citizen suit when the *threat* of that suit secures compliance during the 60-day notice period.¹² Indeed, it is irrational to conclude that entities who come into compliance independently should remain exposed to fines, while those who only do so in response to governmental order are shielded from liability.

The Seventh Circuit failed to respect the structure and purpose of the statute as a whole when it obsessed over:

citizens' . . . incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing the information . . . [and whether] private citizens . . . have to absorb much of the cost of monitoring chemical use . . . with little or no hope of recovering those costs through awards of litigation expenses.

As stated earlier, these costs are minimal and dwarfed in comparison to the costs of EPCRA compliance.

¹² Further, under every other environmental statute -- except where Congress has expressly stated to the contrary -- this same 60-day notice provision operates to bar a citizen suit when a violator comes into compliance during the 60-day notice period. It does not make sense that Congress would treat EPCRA -- a reporting statute -- differently than every other environmental statute concerned with potential risk to human health and the environment.

C. "Plain and Ordinary Meaning" Requires Simple Common Sense

"Plain and ordinary" means obvious, direct, simple, and customary¹³ -- words suggesting that a practical, common sense approach to the statute is in order. Since Congress intended citizens only to supplement government enforcement and not to overburden the federal courts, EPCRA's citizen suit provision should be interpreted consistent with these Congressional objectives and the overall objectives of the statute. In contrast to the Seventh Circuit's and CBE's rather tortured and convoluted interpretation of the relevant words (which they read in isolation rather than in context with the rest of the statute), the Sixth Circuit's decision in *Atlantic States Legal Foundation v. United Musical Instruments, U.S.A., Inc.* is consistent with these objectives. 61 F.3d 473 (6th Cir. 1995).

In *United Musical*, the court concluded that although sections 312 and 313 of EPCRA require the submission of inventory forms by certain dates, the citizen suit provision emphasizes only completing and submitting the forms, not mentioning dates or the timeliness of reporting at all. *Id.* at 475. Moreover, sections 312 and 313 identify various procedures for completing and submitting the required forms. The due dates for the reports are merely one of many procedural steps directed to those who complete and submit the forms. Had Congress intended to authorize citizen suits for *any* violation -- such as late submission -- it could easily have done so. *Id.* Most simply, it could have inserted the word "timely" between the words "and" and "submit." Alternatively, it could have said "in compliance with the requirements of" instead of merely using the term "under."

¹³ Webster's New World Dictionary 1001, 1087 (2d. ed. 1986).

Importantly, EPCRA itself distinguishes between the narrow conditions under which citizen suits can be filed and the broader circumstances under which EPA can act. For example, EPCRA authorizes EPA to bring actions to assess and collect civil penalties against any person "who violates any requirement of section [313]." 42 U.S.C. § 11045(c)(1). The Sixth Circuit recognized that:

Congress limited citizen suits by emphasizing that it is the failure to submit the requisite forms that gives rise to a citizen action. Congress did not authorize citizen suits for other violations of section [313]. This difference between the grants of authority to the EPA and citizen plaintiffs is significant because it indicates a congressional intent to limit citizen suits to ongoing violations and to give the EPA *sole* authority to seek penalties for historical violations.

61 F.3d at 475. (Emphasis added).

The Sixth Circuit's decision also gives full effect to EPCRA's two overriding objectives -- emergency planning and public access to the required information. Once the forms providing the information are filed, the Congressional goals are achieved and a citizen suit is unnecessary. *Id.* at 477. Although civil penalties may be appropriate in some cases, Congress left that decision to EPA. *Id.* It is the government that has "the broad perspective on enforcement and compliance" that is best suited to determine those violators whose conduct warrants penalties. *Id.*

D. If The Court Has Doubts About The Breadth Of EPCRA's Citizen Suit Provision, It Should Resolve Them Against Respondent To Avoid The Serious Article III Issue That Would Otherwise Arise

CBE bears the burden of establishing that it has standing to invoke the jurisdiction of this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 553, 561 (1992). Standing requires that CBE "clearly and specifically set forth facts sufficient to satisfy" the following three criteria:

"injury-in-fact" -- a "concrete and particularized, actual or imminent" invasion of a legally protected interest;

a causal connection between the injury and the conduct of the petitioner; and

a likelihood, not mere conjecture, "that the injury will be redressed by a favorable decision."

Id.; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). CBE has failed to set forth clear and specific facts that it has suffered an injury-in-fact and that any injury, if it had occurred, would be redressed by a favorable decision of this Court.

CBE must allege facts demonstrating that at least one of its members has suffered some actual or threatened harm. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972); *Warth v. Seldin*, 422 U.S. 490, 504 (1975); *Lujan*, 504 U.S. at 560. This "requires more than an injury to a cognizable interest" such as "aesthetic and environmental well-being" or "environmental interests" that are shared by many. *Morton*, 405 U.S. at 734-735. It requires that at least one of CBE's members be among the injured "in a personal and individual

way." *Lujan*, 504 U.S. at 560. "Generalized grievances" and remote possibilities are not sufficient. *Warth*, 422 U.S. at 500, 504, 507.

CBE has never alleged any facts that establish an injury. Beginning with its initial complaint and persisting throughout each of its briefs, CBE alleges only that it was:

deprived of information . . . crucial to the public welfare . . . [that] its interests in protecting and improving the environment and the health of its members have been . . . adversely affected by defendant's actions . . . [that] the safety, health, recreational, economic, aesthetic and environmental interests of CBE's members and their right to know . . . have been . . . adversely affected . . . [that] members of CBE have suffered and continue to suffer . . . [that] the Local Emergency Response Commission's emergency plan . . . is skewed and inaccurate . . . [and that] CBE and its members are relying on the incomplete data [in public data] reports . . . to identify and respond to environmental concerns and to encourage industry to reduce the use of hazardous chemicals.

See Citizens for a Better Environment's (CBE) Complaint at ¶¶ 1, 8, and 9; Opening Brief before the U.S. Court of Appeals for the Seventh Circuit at 11 and 41-42; and Brief In Opposition to Petition for Certiorari, at 3.

CBE claims that it was deprived of the information companies gather under EPCRA "to identify and respond to

environmental concerns and to encourage industry to reduce the use of hazardous chemicals." See Brief In Opposition, at 3. Presumably, the interest CBE claims was injured was its access to information. Imposing penalties in this case, however, will not redress that "injury," since The Steel Company filed all of its EPCRA reports during the 60-day notice period before CBE filed its complaint. As a result, CBE now has access to the information of which it claims it was deprived and the asserted injury has been remedied. To construe EPCRA's citizen suit provision as permitting a claim in this case would raise a serious Constitutional standing problem, which argues forcibly for interpreting EPCRA as not authorizing this litigation. *De Bartolo v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1989); *NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the decision of the Seventh Circuit be reversed.

Respectfully submitted,

David F. Zoll
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APPENDIX

AI

Chemical Manufacturers Association
September 16, 1994

Mr. Sam Sasnett
Chief, Toxic Release Inventory Branch
U.S. Environmental Protection Agency
Mail Stop TS 799
401 M Street, SW
Washington, DC 20460

Re: EPCRA Section 313 Reporting: Transient
Reaction Chemistry

Dear Mr. Sasnett:

The Chemical Manufacturers Association's (CMA's) Pollution Prevention Regulatory Work Group (PPRWG) is disappointed that you could not attend our August 11, 1994 meeting to discuss the issue of transient reaction chemistry as it relates to the Emergency Planning and Community Right-to-Know Act (EPCRA) Toxic Release Inventory (TRI) reporting requirements. The purpose of the meeting was to discuss the scope and impact of your February 16, 1994 memorandum to Mr. Ernest Regna, Chief, EPA Pesticides and Toxic Substances Branch, regarding treatment of transient reaction chemistry under EPCRA Section 313. (See Attachment.) We are concerned by EPA's apparent view that transition products which may be formed and further transformed in closed systems are now considered to fall within the purview of EPCRA.¹⁴ CMA believes such an

¹⁴ These would include "polymerizations and similar reactions which may involve many steps and literally thousands of intermediate

interpretation is inconsistent with the purposes of EPCRA--to promote risk communication and foster significant risk reduction activities.

As CMA interprets your February 16 memorandum, during a sequential reaction (A to B to C) or decomposition sequence (C to B to A), if a TRI-listed reaction product is formed (Chemical B in either example), but then converted to another chemical, (TRI-listed or non-listed), EPA expects a facility to assess this transient product for TRI reporting regardless of how long the transitory reactant exists.¹⁵

CMA has serious concerns regarding this interpretation of EPCRA, and the process by which it has been reached. First, CMA believes that EPA has failed to provide adequate public notice of its interpretation. Second, we are concerned about the lack of bright-line criteria regarding assessment of transient reaction products. Finally, CMA is concerned about the compliance burden imposed by EPA's interpretation. Each of these concerns is explained in greater detail below.

First, CMA believes EPA has failed to provide adequate public notice of its interpretation. As you know, CMA was very active in the development of EPCRA Section 313. The proposed and final rules implementing Section 313 discussed coincidental manufacture; however, the issue of non-coincidental transitory reactants or decomposition materials was not addressed. In conflict with the conclusion

compounds." EPA April 1989 Final Monthly Hotline Report. (See Attachment.)

¹⁵ A simple example is the manufacture of *Trichloro X*, where basic hornbook chemistry of the chlorination sequence is: monochloro *X* to dichloro *X* to trichloro *X*, and where *dichloro X* is a EPCRA 313-listed chemical.

reached in EPA's February 16, 1994 memorandum, EPA's final rule on Section 313 unambiguously states that the Agency's approach to defining "manufacture" "was intended to cover listed chemicals which were created (intentionally or unintentionally) and then passed on in commerce or disposed of, but never otherwise accounted for." 53 Fed. Reg. 4500, 4504 (February 16, 1988). Unlike byproducts and impurities, which are formed and then leave the manufacturing system, transitory reaction products and/or decomposition products are neither passed on in commerce nor disposed of.

CMA further disagrees with EPA's statement that the issue of transition chemistry has been publicly addressed.¹⁶ We can find no reference to this issue, or any notice of availability of the Hotline Monthly Report, in either the Federal Register or in any of the EPA Toxic Chemical Release Inventory Reporting Form R and Instructions.¹⁷ In addition, neither of the two Toxic Chemical Release Inventory Questions and Answers documents EPA published in 1990 and 1991 addresses this issue.¹⁸ In fact, CMA has found nothing in the public domain to support the statement that EPA ever considered this issue in the EPCRA Section 313 rulemaking, or otherwise communicated a position on this issue to the regulated community.¹⁹

¹⁶ "The Agency has already answered substantially the same question in a publicly available document." Memorandum from Sam Sasnett, Chief, EPA Toxics Release Inventory Branch to Ernst Regna, Chief, EPA Pesticides and Toxic Substances Branch, February 16, 1994. (See Attachment.)

¹⁷ Including the revised 1993 version of the Form R, see e.g., Appendix I, Section 313 Related Materials and Information Access.

¹⁸ See EPA 560/4-91-003 (revised 1990 version), 560/4-90-003 (revised 1989 version).

¹⁹ In fact the term, "intermediates", is not even defined under EPCRA, nor in the TRI reporting regulations, 40 C.F.R. 372 *et. seq.*, nor in the

Second, CMA is concerned about the lack of "bright line" criteria on how long transient material must exist to be considered for TRI reporting. The approach taken in the February 16 memorandum defies practical interpretation since it implies that a manufacturer must screen the TRI chemical list to determine if a listed chemical may be formed transiently in the production or decomposition of another substance. We understand that EPA presumes that, for some compounds, there will always be a 1-to-1 ratio between each molecule of a product produced and any transitory products that may form in a manufacturing process. In many cases, transition products may exist for only a fraction of second until the reaction sequence is completed. As a result, the compliance burden imposed by application of the Agency's February 16 memorandum is significant.²⁰

EPA Toxic Chemical Release Inventory Reporting Form R and Instructions.

²⁰ The lack of bright-line criteria for assessing transitory reaction products places a significant compliance burden upon reporters who must attempt to collect this information. The compliance burden includes identification of the transient species in chemical processes for determination if the process meets EPCRA reporting thresholds. It also includes a facility-wide assessment as to whether, taken as a whole, transient formation in multiple operations could meet or exceed the EPCRA reporting threshold. This burden has never been considered by EPA or the Office of Management and Budget (OMB) in assessing the cost of EPCRA Section 313. EPA's original burden estimate of Section 313 assumed that an average reporting facility would be submitting four chemical reports and one mixture report/year. See, I.C.F. Inc. Regulatory Impact Analysis in Support of Final Rulemaking Under Section 313 of Title III of the Superfund Amendment and Reauthorization Act of 1986 (February 1988). In addition, the Agency's recently proposed chemical expansion of the TRI also does not consider the burden imposed by assessing transient species, 59 Fed. Reg. 1788 (January 12, 1994), on an expanded list of more than 300 chemicals and chemical categories.

Third, CMA is concerned about the burden the Agency imposes on the regulated community to ascertain the potential formation of TRI-listed transitory reaction or decomposition products. This imposes a significant additional compliance burden upon the regulated community particularly since EPA has recently proposed doubling the Section 313 list of regulated materials. The burden inherent in verifying whether any specific chemical could form a transition product in a complex chemical reaction would be enormous. As noted earlier, basic chemistry suggests that there are numerous TRI-listed chemicals which could form during sequential chemical reactions in the formation of other listed chemicals. CMA does not believe that Congress or EPA intended to require the regulated community to search the TRI list of specific chemicals and chemical categories to determine if their processes or thermal units might "manufacture" TRI-listed chemicals as transient species. In the past, EPA has recognized that non-isolated transient species are extremely difficult to identify and have limited exposure potential. 48 Fed. Reg. 21729 (May 13, 1983) (EPA exempted non-isolated intermediates from reporting under the Toxic Substances Control Act because these substances are extremely difficult to identify and have limited exposure potential.)

Finally, the February 16 memorandum is inconsistent with the Agency's efforts to redefine the glycol ethers category for TRI reporting, 59 Fed. Reg. 34386 (July 1, 1994). For example, if the criteria described in the memorandum are applied to manufacturers of (presently excluded) high molecular weight glycol ethers, these same manufacturers would now be obligated to submit TRI reports on transient low molecular weight glycol ether species that may form in process equipment during the manufacture of the excluded high molecular weight products. Such a result is clearly not consistent with the relief provided by the final

rule. Similarly, application of the February 16 memorandum to on-site thermal treatment units would cause reporting of TRI listed transitory species formed during molecular decomposition as "manufactured" by the facility -- a result that is inconsistent with the structure of the current Section 313 reporting form and regulation.

CMA does not believe that the issue of transient reaction chemistry has been adequately considered by the Agency or is well-settled under EPCRA. We also do not believe that the Agency's seeming reluctance to address this matter through rule clarification (versus rule enforcement) complies with Executive Order 12862 (Setting Customer Service Standards), or Executive Order 12866 (Regulatory Planning and Review). The process by which EPA has reached its current position on transient reaction chemistry is inconsistent with administrative fairness and statutory due process.

CMA previously requested a meeting with your office to help us gain a better understanding of the Agency's position. We would appreciate your involvement in arranging such a meeting in the near future. Please contact Leslie Winik at (202) 887-4764 if you have any questions, or would like to discuss this matter further.

Sincerely,

Claudette M. Cofta
Director,
Product Stewardship

Attachment

cc: Mark Greenwood, EPA OPPT

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY REGION II

In the Matter of
XXXXXXXXXX

Respondent.

Proceeding under Section 325(c)
of Title III of the Superfund
Amendments and Reauthorization
Act

CONSENT AGREEMENT
AND
CONSENT ORDER

DOCKET NO.
II EPCRA-94-0113

PRELIMINARY STATEMENT

This administrative proceeding for the assessment of a civil penalty was instituted pursuant to Section 325 (c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C § 11001 et seq. [also known as the Emergency Planning and Community Right-to-Know Act of 1986 (hereinafter, "EPCRA")].

The Complainant in this proceeding, the Director of the Environmental Services Division, Region II, United States Environmental Protection Agency ("EPA"), issued a Complaint and Notice of Opportunity for Hearing to Respondent, XXXXXXXX ("Respondent"), on May 17, 1994.

The Complaint charged Respondent with six (6) violations of Section 313 of EPCRA, 42 U.S.C. § 11023 and regulations promulgated to that Section, 40 C.F.R Part 372.

FINDING OF FACT AND CONCLUSIONS OF LAW

1. Respondent is XXXX, a corporation duly existing under and organized pursuant to the laws of the State of XXXXX.
2. At all times relevant hereto, Respondent has owned and operated a facility located at XXXX, XXXX, XXXX XXXX (hereafter, "Respondent's Facility").
3. Respondent is a "person" within the meaning of Section 329 (7) of EPCRA, 42 U.S.C. § 11049(7).
4. Respondent is an owner of a "facility" as that term is defined by Section 329(4) of EPCRA, 42 U.S.C § 11104(7), and by 40 C.F.R § 372.3.
5. Respondent's facility is subject to the requirements of EPCRA, Section 313 (b), 42 U.S.C. § 11023(b), and 40 C.F.R. § 372.22.
6. On July 21, 1993 duly designated representatives of the EPA conducted an inspection of and at Respondent's facility (hereinafter, "the Inspection").
7. As a result of the Inspection, EPA issued a Complaint alleging that Respondent failed to submit in a timely manner to the Administrator and to the State XXXX XXXX a complete and correct Form R for XXXX for the calendar year 1991, which would constitute a failure to comply with Section 313 of EPCRA, 42 U.S.C § 111023, and with 40 C.F.R. § 372.30.
8. As a result of the Inspection, EPA issued a Complaint alleging that Respondent failed to submit in a timely manner to the Administrator and to the State of XXXX

Jersey complete and correct Forms R for [Chemical A] for the calendar years 1988, 1989, 1990, 1991, and 1992, which would constitute failures to comply with Section 313 of EPCRA 42 U.S.C § 11023, and with 40 C.F.R. § 372.30 for each of these years.

9. On July 6, 1994, the parties met for an informal settlement conference.
10. EPA withdraws the allegations contained in the Complaint, Count 5. XXXX has satisfied EPA that its XXXXXXXXXX facility did not "otherwise use" formaldehyde in excess of threshold quantities during the calendar year 1991.
11. XXXX does not admit as true EPA's Findings of Facts and Conclusions of Law which purport to support EPA's allegation that XXXX violated EPCRA Section 313 on the basis that XXXX XXXXXXXXXX Facility "manufactured" or "processed" [Chemical A] in excess of threshold quantities during the calendar years 1988 through 1992, as alleged in the Complaint, Counts 1, 2, 3, 4 and 6.
12. On September 14, 1994, the Chemical Manufacturers Association (CMA) sent a letter concerning the reportability of transient reaction chemistry products under EPCRA Section 313 to Mr. Samuel K. Sasnett, U.S.E.P.A., which XXX herein adopts. A copy of the CMA letter is attached to this Consent Agreement.
13. EPA does not consider [Chemical A] to be a transient chemical, but rather a stable chemical species, subject to the reporting requirements of section 313 of EPCRA, 42 U.S.C § 11023 and regulations pursuant to that Section, 40 C.F.R Part 372.

14. XXXX does not agree with the paragraph 13 statement or that current EPCRA regulations require a determination of chemical species stability as a relevant factor in the decision to report.

TERMS OF CONSENT AGREEMENT

Based on the foregoing, and pursuant to Section 325(c) of EPCRA, and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22 (hereinafter, "Consolidated Rules"), it is hereby agreed by and between the parties hereto, and accepted by Respondent, that Respondent voluntarily and knowingly agrees to, and shall, comply with the following terms:

1. Respondent shall pay, by cashier's or certified check, a civil penalty in the amount of **Fifty Six Thousand Two Hundred Fifty Dollars (\$56,250)**, payable to the "Treasurer of the United State of America". The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document.

Such Check shall be mailed to:

EPA Region II (Regional Hearing Clerk)
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

Payment must be received at the above address on or before sixty (60) calendar days after the effective date (the date by which payment must be received shall hereafter be referred to as the "due date").

Respondent shall also send a copy of this payment to Barbara Metzger, Director, Environmental Services Division, U.S. Environmental Protection Agency, Region II 2890 Woodbridge Avenue, Edison, New Jersey 08837.

The effective date of this order shall be the date it is signed be the regional Administrator, shown below.

a. Failure to pay the penalty in full, according to the above provisions, will result in the referral of this matter to the U.S. Department of Justice for collection.

b. Furthermore, if payment is not received on or before the due date, interest will be assessed, at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C § 3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of \$15.00 will be assessed for each 30 day period (or any portion thereof) following the due date in which the balance remains unpaid.

c. A 6% per annum penalty also will be applied on any principal amount not paid within 90 days of the due date.

2. Respondent will undertake the Supplemental Environmental Project (SEP) agreed to between the parties which is to modify the XXXX facility's manufacturing process by controls. This SEP will enable Respondent to reduce XXXX waste discharged by (an estimated) XX to XX pounds per year. Respondent estimates that it will take approximately eighteen (18) months from the entry of this Consent Agreement and Consent Order to complete the installation of the SEP. It is agreed that the SEP will be in place within eighteen (18) months of the entry of this Consent Agreement, and utilized to reduce XXXX waste

discharges as long as the production scheme remains the same. If the SEP is not in place by that time or is not utilized thereafter to reduce waste discharges, for any reason other than the discontinuance of the current manufacturing scheme, the SEP reduction of 25% of the total proposed penalty or **Thirty One Thousand Two Hundred Fifty Dollars (\$31,250)** shall be immediately due and payable in accordance with paragraph 1 of this Section.

3. Respondent has submitted estimated costs for the installation of the SEP, which include a general description of the equipment and process to Dr. Ernest Regna, Chief, Pesticides and Toxic Substances Branch, 2890 Woodbridge, Ave., Building 10, (MS-105), Edison, New Jersey 08837, to document Respondent's intention to implement the SEP. Respondent estimates that the project costs for this SEP will equal or exceed \$70,000. Respondent agrees to provide EPA three (3) written progress reports on the status of the SEP within six (6), twelve (12) and eighteen (18) months of the entry of this Consent Agreement and Consent Order. Respondent also agrees to retain invoices and other records necessary to document the cost of the SEP and will provide to Dr. Ernest Regna copies of its internal cost summary records in the two status reports. Further, if it is determined that the final cost of this SEP is less than Sixty Two Thousand Five Hundred Dollars (\$62,500), Respondent agrees that one half of the cost difference between the actual cost and \$62,500 shall be immediately due and payable under the terms specified in paragraph 1 of this Section.

4. This Consent Agreement and Consent Order shall relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination, any issue related to any federal, state, or local permit nor shall it be construed to constitute an EPA approval of the equipment or

technology installed by Respondent under the terms of this Agreement.

5. Respondent and the signatory for the Respondent both certify, as of the date of Respondent is not otherwise required, by virtue of any local, state or federal statute, regulation, order, consent decree or other law, to perform the tasks specified in Paragraphs 2 through 3 of this Consent Agreement. Respondent's signatory further certifies that Respondent has not already received, and is not currently negotiating to receive credit in any other enforcement action for any of these same tasks.

6. For the purpose of this Consent Agreement, Respondent: (1) admits the jurisdictional allegation of the Complaint, §§ 8 through 14; and (2) neither admits nor denies the specific allegations of the facts in the Complaint or in this Consent Agreement.

7. Each Party to this action agrees to pay its own costs and attorney fees.

8. EPA agrees to respond to the Chemical Manufacturers Association (CMA) regarding the issues raised in its September 14, 1994 letter to Mr. Samuel K. Sasnett, U.S.E.P.A.

9. XXXX agrees to file Forms R for the "manufacturing" and "processing" of [Chemical A] at its XXXX facility for the reporting years 1988 through 1992 within ten (10) days of XXXX's receipt of the executed Consent Agreement and Consent Order. XXXX will send copies of these Forms R to Dr. Ernest Regna.

10. This consent Agreement is being entered into by the parties in full settlement of all civil liabilities, if any, that

might have attached as a result of the allegations in the Complaint. Respondent has read the Consent Agreement and Consent Order; consents to the terms of the Agreement and its issuance as an Order.

11. Furthermore, Respondent consents to the assessment of the civil penalty as set forth in this Consent Agreement and explicitly waives its right to request a hearing on the Complaint, this Agreement, or the attached Consent Order.

12. Respondent waives any right it may have pursuant to 40 C.F.R. 22.08 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Regional Administrator or the Deputy Regional Administrator where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the attached Consent Order.

13. Each undersigned signatory to this Consent Agreement certified that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement.

RESPONDENT:

XXXX
Date: 11/22/94

COMPLAINANT:

Barbara Metzger, Director
Environmental Services

Division

U.S. Environmental Protection
Agency - Region II
2890 Woodbridge Avenue
Edison, New Jersey 08837
Date: December 1, 1994

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CONSENT ORDER

The Regional Administrator of EPA, Region II concurs in the foregoing Consent Agreement, which is being entered into by the parties in full settlement of EPA's Complaint bearing Docket No. II EPCRA-94-0113, issued in the matter of XXXX. The Agreement entered into by the parties is hereby approved and issued, as an Order, effective immediately upon execution below.

Date: 12/12/94

Administrator

William J. Muszynski, P.E.
Deputy Regional

U.S. Environmental Protection
Agency - Region II
26 Federal Plaza
New York, New York 10278

10

Supreme Court, U.S.

FILED

MAY 2 1997

CLERK

No. 96-643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
v. *Petitioner,*
CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF AMICUS CURIAE
CLEAN AIR IMPLEMENTATION PROJECT
IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE
CLEAN AIR IMPLEMENTATION PROJECT
IN SUPPORT OF PETITIONER

INTERESTS OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court,¹ the *Amicus Curiae*, Clean Air Implementation Project, files this brief in support of the petitioner, The Steel Company. The Clean Air Implementation Project (CAIP) is a nonprofit trade association whose members represent a broad cross-section of American industry.

¹ Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The members of CAIP consist of 22 major corporations in the chemical, petroleum, pharmaceutical, and other industries. CAIP regularly addresses issues of interest to its members relating to the development and implementation of requirements under federal and state clean air programs. In particular, CAIP has participated on behalf of its members in major rulemaking proceedings involving the implementation of the Clean Air Act by the United States Environmental Protection Agency (EPA) and has submitted extensive comments in those proceedings. CAIP also has brought judicial challenges to a number of final rules promulgated by EPA under the Clean Air Act.

CAIP adopts and supports petitioner's argument for reversal of the decision below on grounds that citizen suits under section 326 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046 (1994), may not be brought to seek civil penalties for wholly past violations, as the Sixth Circuit held in *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473 (6th Cir. 1995). This brief is submitted to supplement that argument by bringing to the Court's attention the fact that the Seventh Circuit in its opinion in this case misconstrued the citizen suit provisions of the Clean Air Act.

INTRODUCTION

In reaching its decision in the instant case, the Seventh Circuit relied in part on Congress' amendment of the Clean Air Act citizen suit provision in 1990. The court of appeals stated that the amendment "permit[ted] citizen enforcement actions for past violations, yet left the notice provision intact." Pet. App. A13. According to the court of appeals, the fact that Congress had, in its view, authorized citizen suits under the Clean Air Act for past violations that had been corrected, but had not altered the provision requiring that a plaintiff provide 60 days'

notice to the alleged violator before filing suit, undercut one of the bases for this Court's decision in *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). The Seventh Circuit's belief that this portion of the *Gwaltney* decision "is no longer as compelling as it was when *Gwaltney* was decided" helped lead that court to conclude that the "for failure to" language in the EPCRA citizen suit provision should be read as allowing citizen suits for wholly past violations. Pet. App. A13.

In *Gwaltney*, this Court relied in part on an essentially identical 60-day notice provision to conclude that the "to be in violation" language in the Clean Water Act citizen suit provision does not encompass past violations that are not ongoing. The Court concluded that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act" and that, if citizen suits may target past violations that are not ongoing, "the requirement of notice to the alleged violator becomes gratuitous." 484 U.S. at 60.

The question addressed in this brief is whether Congress, in amending section 304(a)(1) of the Clean Air Act, 42 U.S.C. § 7604(a)(1) (1994), intended to authorize citizen suits for the recovery of civil penalties for violations that are not "ongoing." By an "ongoing violation," we mean a violation which is continuing and for which injunctive relief is required to compel the facility to take the necessary steps to achieve a state of "ongoing" compliance. This brief challenges the Seventh Circuit's construction of the language in section 304(a)(1) establishing jurisdictional prerequisites for citizen suits, and explains why Congress only authorized citizen suits for civil penalties in much more limited circumstances than would be permissible under that court's interpretation.

In 1990, Congress amended the citizen suit authorization in section 304 of the Clean Air Act in two notable respects. Most significantly, it provided that, in actions where citizens are awarded injunctive relief, they also may

seek civil penalties payable to the federal government of up to \$25,000 per day of violation. Pub. L. No. 101-549, 104 Stat. 2674, 2682. Previously, citizens could only bring actions for injunctive relief. In addition, Congress revised the jurisdictional grounds for citizen suits by adding language which provides that citizens can bring actions where "the alleged violation has been repeated." *Id.* at 2683. It retained the authorization in the pre-1990 version of section 304(a)(1) for actions where a source is alleged "to be in violation." Congress did not revise the provision requiring 60 days' prior notice before citizen suits can be initiated.

Interpreting the citizen suit authorization only to permit actions for civil penalties where violations are ongoing and where injunctive relief is thus necessary is particularly critical under the Clean Air Act. Many major sources of air emissions are subject to dozens of different emission limitations, often set as hourly limits, that apply to hundreds of different pieces of equipment. Typically, these emission limitations were established based on use of a particular control technology. Because EPA and states did not have sufficient data to establish standards based on continuous monitoring, they provided in many instances for the "exclusive" method for making compliance determinations to be through periodic performance of a "reference test" under specified operating conditions. Compliance at other times was to be demonstrated by performing operations and maintenance consistent with good air pollution control practices. As additional data have been generated, EPA and state agencies have come to recognize that properly controlled, well-operated sources will, from time to time, have emissions that are above the emission limitations due to normal emissions variability. In the past, these emission excursions did not constitute violations.

On February 24, 1997, EPA promulgated a rule that revises federal regulations to provide that such reference tests shall no longer be the exclusive method for proving

violations of emission limitations. Credible Evidence Revisions: Final Rule, 62 Fed. Reg. 8314 (1997). Under that rule, EPA provides that emissions information not gathered under the same conditions as reference tests can be used to prove violations in federal and state enforcement actions and in citizen suits under section 304 of the Clean Air Act. This rule was adopted without analyzing the compliance implications for the thousands of standards it affects. For a large number of standards, the implications will be that regulated facilities—despite the installation of required control technology coupled with good operations and maintenance—will not be able to show compliance, as determined under this new rule, 100% of the time. Performance that constituted compliance in the past will now be potentially subject to enforcement as noncompliance. For these reasons, numerous industry trade associations and individual companies have filed more than 80 petitions for review with the U.S. Court of Appeals for the District of Columbia Circuit challenging either the final rule itself or the revisions the rule makes to the compliance determination provisions for numerous federal standards. *Clean Air Implementation Project v. EPA*, Nos. 97-1117 *et al.* (D.C. Cir.).

In adopting this new rule, EPA recognized that the rule has the potential to result in unavoidable emission excursions now becoming the target of enforcement actions. As a consequence, EPA discussed at length the enforcement policies it will pursue in the preamble to the final rule. Specifically, EPA pointed out that it will "exercise prosecutorial discretion" in circumstances that will routinely arise with respect to many limitations at facilities that are well controlled and operated. 62 Fed. Reg. at 8318. Without such prosecutorial discretion, many sources would, and in many cases still will, face the Hobson's choice of curtailing plant operations or installing expensive controls that achieve little or no environmental benefit.

The practical implications of this rule for citizen suit litigation are enormous. Now, citizen groups will likely

argue that they should be able to recover civil penalties for random, but in the aggregate significant in number, emission excursions—even though facilities have taken every action envisioned at the time applicable standards were set. Despite EPA's stated intention to exercise "prosecutorial discretion," citizen groups are not bound to follow the Agency's enforcement policies. Under the Clean Water Act, citizen suits have often been successfully brought—even after the *Gwaltney* decision—in situations where the facility was taking the steps to control its effluent discharges that EPA and state agencies believed appropriate. The nature and extent of air emission control requirements will make this a much more pervasive problem under the Clean Air Act. The numbers of individual emission points subject to limitations on air emissions at a single facility are commonly orders of magnitude greater under the Clean Air Act than the outfalls regulated under the Clean Water Act. As a consequence, the potential for frivolous or disruptive citizen group actions where EPA and states intend to exercise prosecutorial discretion is staggering.

While the interpretation of the Clean Air Act's citizen suit provision is not before this Court, the Seventh Circuit's matter-of-fact reference to its conclusion that the Clean Air Act authorizes actions for past violations is merely the prelude to the federal court litigation that will ensue in response to the expected avalanche of citizen suits. Initiation of such litigation will be a simple matter once industrial facilities, beginning in the next few years, are required under EPA's regulations to file semiannual monitoring reports. 40 C.F.R. § 70.6(a)(3)(iii)(A) (1996). This expectation is based upon experience under the Clean Water Act where the submission of similar reports also triggered the filing of vast numbers of citizen suits.

This Court's decision in this case will, like *Gwaltney*, be a key precedent for courts in interpreting the Clean

Air Act. However, as explained below, the *Gwaltney* decision has been misapplied in many citizen suits. The message from the Court's opinion seemed clearly to be that citizen suits for civil penalties are permissible only where a real noncompliance problem exists. But district courts have interpreted the Court's references to the permissibility of citizen suits where there are "intermittent" violations as authorizing citizen suits for civil penalties where injunctive relief is neither required nor granted, because no need exists for the facility to take corrective action.

Accordingly, unless this Court makes clear that citizens suits may only be brought where violations are "ongoing" and that the test for determining whether they are ongoing is that injunctive relief must be necessary to compel the facility to come into compliance, it is likely that some federal courts will interpret section 304 of the Clean Air Act to permit citizen suits for civil penalties where a noncompliance problem does not exist. As we further argue in this brief, if courts decide to interpret section 304 to allow such actions, citizen groups cannot satisfy the prerequisites for Article III standing and thus those actions should be found impermissible under the Constitution.

Even if this Court's decision prescribes very narrow criteria that make clear that citizen suits for civil penalties may only be brought where injunctive relief is necessary to require correction of a real ongoing noncompliance problem, the citizen suit authorization under the Clean Air Act will still likely be abused in many circumstances. As the foregoing indicates, EPA and states will routinely choose to exercise prosecutorial discretion with respect to numerous emission limitations at vast numbers of facilities throughout the country in order to implement the Clean Air Act in a manner that will not be grossly unfair to American industry. Not being bound by such government decisions, citizen groups will be able to wield the \$25,000 per day penalty enforcement weapon under the

Clean Air Act in a manner that will routinely conflict with the Executive's exercise of its prosecutorial discretion.² Rather than face risks of massive penalties for inconsequential excursions that may be construed to be violations, facilities will often conclude they should opt to avoid this risk and agree to pay penalties in amounts that are lesser, but nonetheless significant.

With narrowly drawn criteria, this Court's decision could significantly reduce the potential for misapplication and abuse of the Clean Air Act's authorization for citizens to seek civil penalties—both in federal court litigation and settlements with citizen groups. Absent such clear direction, the likelihood exists that there will be a significant encroachment on the prosecutorial discretion of the Executive. For this reason, it is likely that a petitioner in a future case will call upon this Court to find the Clean Air Act citizen suit authorization unconstitutional as a violation of separation of powers.

SUMMARY OF ARGUMENT

As amended in 1990, section 304(a)(1) of the Clean Air Act authorizes citizens to bring actions to seek injunctive relief "and . . . appropriate civil penalties" payable to the federal government. Such actions may only be brought where the emissions source is "alleged to be in violation" or where "the alleged violation has been repeated." When read in conjunction with Congress' dictate that citizens' actions for civil penalties are permissible only where injunctive relief is necessary, it is clear that Congress' jurisdictional prerequisites, including the authorization of actions for "repeated" violations, necessitate that violations be "ongoing." Otherwise, no

² The huge amounts of civil penalties which citizen groups can seek from industrial facilities are well illustrated by this case, where the plaintiff sought penalty amounts of more than \$537 million based on The Steel Company's alleged failure—promptly corrected upon notification—to file two different forms required by EPCRA.

need exists for granting injunctive relief to correct a noncompliance problem, the necessary condition precedent to awarding civil penalties.

Thus, under the most reasonable reading of the jurisdictional criteria in section 304(a)(1), citizen suits for civil penalties may be brought in much more limited circumstances than the Seventh Circuit's opinion indicates. Congress' retention of the "alleged to be in violation" criterion can best be read, as Justice Scalia explained in his concurring opinion in *Gwaltney*, to authorize actions where the source clearly is not in a "state" of compliance, and thus citizens can properly seek injunctive relief. The "repeated" violation criterion also must be read to permit citizen suits only where injunctive relief is required. Here again, a showing of "ongoing" noncompliance, albeit of a slightly different nature, is required. To meet that test, the violation must not only have occurred repeatedly, there must be a virtual certainty that the same violation will recur in the future. But the essential prerequisite is that injunctive relief is required to compel ongoing compliance.

The interpretation of section 304(a)(1) as only authorizing citizen suits based on violations that are ongoing is also supported by Congress' choice of language in simultaneously amending the provisions addressing EPA's enforcement authority. In those provisions, Congress clearly authorized EPA, in contrast to its authorization for suits brought by private citizens, to pursue judicial or administrative enforcement actions whether or not the violations in question are "ongoing."

The language of section 304(a)(1) should additionally be construed narrowly in order to avoid interference with EPA's enforcement authority and prosecutorial discretion. As this Court stated in *Gwaltney*, citizen suits are intended to "supplement" rather than to "supplant" EPA's enforcement efforts. 484 U.S. at 60. Construing section 304

(a)(1) to authorize citizen suits for civil penalties based on violations that are not ongoing would greatly interfere with EPA's exercise of prosecutorial discretion.

Contrary to the Seventh Circuit's conclusion, the fact that Congress in 1990 amended the language of section 304(a)(1), but chose not to alter the language of the 60-day notice provision in section 304(b), does not mean that Congress intended to authorize the filing of citizen suits based on violations that are not ongoing. Indeed, precisely the opposite is true. Congress' decision not to alter the notice provision further supports reading the language in section 304(a)(1), including that added in 1990, as authorizing citizen suits based on past violations only where injunctive relief is required to compel ongoing compliance. Notice to the alleged violator will provide it the opportunity to take any necessary corrective action within the 60-day notice period and thereby make filing a civil action unnecessary.

The section 304(a)(1) jurisdictional prerequisites should be interpreted not to encompass violations that are not ongoing for a separate, compelling reason. Such a reading would violate the "case or controversy" requirement of Article III. To invoke federal court jurisdiction, a plaintiff must satisfy the three-part test for Article III standing established by this Court. However, a citizen-plaintiff seeking the recovery of civil penalties based on violations that are not ongoing cannot meet either the "injury-in-fact" or "redressability" prongs of that test. Such a citizen-plaintiff will not be able to demonstrate that it is suffering from a continuing "concrete and personalized" injury and that any alleged injury to it can be redressed by a defendant's payment of civil penalties to the federal government. For these reasons, section 304(a)(1) must be given the narrow interpretation delineated in this brief.

ARGUMENT

SECTION 304(a)(1) OF THE CLEAN AIR ACT SHOULD BE CONSTRUED AS ONLY AUTHORIZING CITIZEN SUITS FOR ONGOING VIOLATIONS.

A. Under Section 304(a)(1), A Citizen Suit Seeking Civil Penalties May Be Brought Only Where Injunctive Relief Is Also Necessary To Compel The Facility To Come Into Compliance With Applicable Emission Requirements.

As this Court stated in *Gwaltney*, "[i]t is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Id.* at 56 (quoting *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Section 304(a)(1) of the Clean Air Act, as amended, provides in relevant part that a person may commence a civil action on his or her own behalf

against any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation

In the Clean Air Act Amendments of 1990, Congress added the phrase—"to have violated (if there is evidence that the alleged violation has been repeated)"—to the prior version of section 304(a)(1). Pub. L. No. 101-549, 104 Stat. 2683. The pre-1990 version of section 304(a)(1) stated that a citizen suit could be brought under that provision where a person "is alleged to be in violation." That language was essentially identical to the language of section 505(a) of the Clean Water Act, the corresponding citizen suit provision of that statute.

Congress also made one additional significant change to the citizen suit authorization. It amended section 304

(a)(1) to authorize district courts to award citizens injunctive relief "and to apply any appropriate civil penalties." The pre-1990 statute only provided for injunctive relief to be granted.

In *Gwaltney*, this Court construed the phrase "is alleged to be in violation" contained in section 505(a) of the Clean Water Act and held that the citizen-plaintiff must allege (and ultimately prove) the existence of an "ongoing violation." 484 U.S. at 67. In his concurring opinion, Justice Scalia explained that "the phrase 'to be in violation' . . . suggests a state rather than an act—the opposite of a state of compliance." Elaborating on the majority opinion, he stated that a defendant in a state of violation would remain in violation until it corrected the problem even if it had a "good or lucky day" on which it did not violate the standard in question. *Id.* at 69.

Congress' decision to amend section 304(a)(1) apparently indicates that, for purposes of the Clean Air Act, Congress believed that the authority to bring citizen suits should extend in prescribed circumstances to cover non-compliance in addition to the situations where compliance only occurs on the "good or lucky day." However, the additional language chosen by Congress should nonetheless be interpreted only to authorize the filing of citizen suits to recover civil penalties for past violations that are ongoing, *i.e.*, violations which are virtually certain to recur and require injunctive relief to compel compliance.³

³ The statements in the legislative history concerning the language added to section 304(a)(1) generally do not shed much light on Congress' precise intent in amending the provision. However, Rep. Fields, one of the House-Senate conferees, did attempt to provide an explanation regarding what situations would fall under the new language:

Citizen suits are generally inappropriate for past violations. The conferees narrowed the House provision which required only an allegation of repeated or continuous past violations. The conferees agreed that citizens should be required to pre-

Perhaps the most significant aspect of the language added to section 304(a)(1) by the 1990 amendments is that Congress made clear that citizens may only bring actions for civil penalties where injunctive relief must be awarded to compel compliance. In amending the citizen suit authorization, Congress added the phrase "and to apply any appropriate civil penalties . . ." to the sentence in the pre-1990 law authorizing district courts to award injunctive relief. Pub. L. No. 101-549, 104 Stat. 2682. Congress' use of the conjunction "and" demonstrates that jurisdiction to impose civil penalties is limited to circumstances where injunctive relief is necessary. A court may, however, assess civil penalties only where it deems this additional relief to be "appropriate."

Another significant aspect of the language added to section 304(a)(1) by the 1990 amendments is that Congress made clear that a past violation by itself would *not* be sufficient to provide the basis for a citizen suit. Although Congress inserted the words "to have violated," Congress immediately qualified those words with the following parenthetical phrase: "(if there is evidence that the alleged violation has been repeated)." As this Court ruled in *Gwaltney*, the fact that Congress chose not to phrase a citizen suit provision using language that looked solely to the past is entitled to substantial weight in determining whether Congress intended to authorize citizen suits based on violations that are not ongoing.⁴ 484 U.S. at 57.

sent competent evidence of past violations and that the evidence demonstrate repeated violations. . . . The evidence must demonstrate that the past violations were frequent, that the alleged violator habitually ignored applicable requirements and that the agency did not adequately enforce the law.

136 Cong. Rec. E3677 (daily ed. Nov. 2, 1990).

⁴ Only a few district courts have thus far addressed the issue of how section 304(a)(1) should be interpreted. The court in *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561, 1565 (N.D. Ga.

Based on the statutory language and the Clean Air Act's overall enforcement scheme, the most reasonable reading of section 304(a)(1), as amended, is that citizen suits can be brought based on past violations only under a very narrow set of circumstances. The language added to section 304(a)(1) requires that a past violation be a "repeated" violation to provide the basis for a citizen suit. The word "repeated" means "said, done, or occurring again and again."⁵ Thus, Congress' choice of language indicates that Congress intended that a past violation, to provide the basis for a citizen suit, must be one which has recurred and will continue to recur, unless corrected.

For a violation to be "repeated," it must involve the same limitation and the same piece of equipment within the facility.⁶ In other words, Congress intended that sec-

1994), stated that "courts will not allow citizens to file suits based on violations that have been corrected. The Clean Air Act citizen suit is not intended to be a windfall for plaintiffs. Rather, it is intended to encourage and enforce compliance with environmental regulations." Other district courts have construed section 304(a)(1) differently. *E.g.*, *Adair v. Troy State Univ. of Montgomery*, 892 F. Supp. 1401 (M.D. Ala. 1995).

⁵ The American Heritage Dictionary (2d Coll. ed.) (1985).

⁶ A large industrial facility regulated under the Clean Air Act will typically contain dozens or even hundreds of discrete sources of air emission ranging from small valves to huge smokestacks—with virtually every individual emission point being subject to one or more emission standards for various pollutants. Thus, for purposes of the Clean Air Act, the concept of a violation being a repeated violation makes sense only if the same violation must involve the same piece of equipment, the same pollutant, and the same underlying cause. If, instead, a repeated violation were construed to mean merely an exceedance of the same standard by any emissions unit anywhere in the facility, there would typically be no relationship between the two occurrences whatsoever and no basis for concluding that a violation was being repeated. For example, if a tank in one part of a facility and a tank in another part of the facility both happen to violate the same standard regulating emissions of volatile organic compounds (VOCs), there would be no proper basis for concluding that these events could involve a pattern of repeated

tion 304(a)(1) authorize actions where a specific violation has occurred frequently or as part of a pattern and where, despite the frequency or pattern of this same violation, the facility has not taken action to correct the specific cause of the violation. Accordingly, in such a situation, there is a virtual certainty that the violation will recur in the future and necessary corrective action will not be taken unless injunctive relief is granted in either an EPA or citizen enforcement action.

The importance of Congress' choice of words in section 304(a)(1) is further highlighted by the language that Congress simultaneously added in 1990 to the corresponding provisions in section 113 of the Act governing enforcement actions brought by EPA. In prescribing EPA's authority to bring judicial or administrative actions to recover civil penalties, Congress consistently used the phrases "has violated or is in violation of" or "has violated and is violating" without providing any qualification concerning whether a particular violation had been repeated.⁷ The decision to use broad, unqualified language in describing EPA's enforcement authority further shows

violations. We note that this situation is typically different from that of a facility being regulated under the Clean Water Act, where all effluents are usually discharged from one outfall or a small number of outfalls and specific requirements do not apply to individual pieces of equipment within the plant. Nevertheless, under the Clean Water Act, the *Gwaltney* decision has been interpreted by some district courts as authorizing actions for civil penalties where the so-called "ongoing" violation was based upon violations of different limits with different causes, not the same limit and the same causes. *See, e.g.*, *Public Interest Research Group of New Jersey v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164, 1173-76 (D. N.J. 1993); *Public Interest Research Group of New Jersey v. Yates Industries, Inc.*, 790 F. Supp. 511, 514-16 (D. N.J. 1991).

⁷ For example, this language was included in subsections 113(a)(1), (a)(3), (b)(1), (b)(2), (d)(1)(A), and (d)(1)(B) of the Act (codified at 42 U.S.C. § 7413(a)(1), (b)(1), (b)(2), (d)(1)(A), and (d)(1)(B)). *See* Pub. L. No. 101-549, 104 Stat. 2672, 2673, and 2677.

that Congress did not intend that citizens could bring suit regarding violations that are not ongoing.

The reading of section 304(a)(1) set forth above is also consistent with the principle that the citizen suit provision must be interpreted to avoid intruding on the enforcement authority and prosecutorial discretion of EPA.⁸ In *Gwaltney*, the Court pointed out that the proper role of citizen suits is to supplement, rather than supplant, governmental enforcement measures. It stated that permitting citizen suits for past violations that are not ongoing "could undermine the supplementary role envisioned for the citizen suit." 484 U.S. at 60. The Court further discussed an example of the problems which would be created by interpreting citizen suit provisions to authorize

⁸ Even when construed narrowly, the citizen suit provisions of the environmental statutes raise serious questions regarding violations of the Constitution's separation of powers. As discussed in the Introduction, this is particularly true under the Clean Air Act. The authority granted to citizens to bring private actions for the recovery of civil penalties is generally interpreted by courts to be identical in many respects to the authority that Congress has delegated to the Executive Branch. Congress' establishment of such an independent private scheme for prosecuting alleged violators of federal law arguably conflicts with the Constitution's Article II grant of powers to the Executive. Since Congress can assign such executive functions only to Presidential appointees, the authorization of private citizens to prosecute for civil penalties appears to violate the separation of powers mandate of the Constitution.

Because this case presents the issue of whether citizens have standing to bring actions for civil penalties based on past violations that are not ongoing, we do not brief the question of whether the Constitution's separation of powers is also violated. A ruling that citizen-plaintiffs may not recover under EPCRA for such violations or that they lack Article III standing to bring such actions would make it unnecessary to address the separation of powers issue, which was not raised in the lower courts. As forecast in the Introduction, the encroachment on the Executive's prosecutorial discretion under the Clean Air Act, however, will likely be so great that this Court will be asked at a future time to find that it violates the separation of powers under the Constitution—even if courts properly construe that statute's citizen suit authorization very narrowly.

civil penalty actions for such past violations. In that hypothetical example, EPA exercised its prosecutorial discretion to agree not to seek civil penalties on the condition that the alleged violator take extraordinary corrective measures that it would otherwise not be required to take. As the Court explained, "[i]f citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61. The teaching of this portion of the *Gwaltney* decision is that citizen suit provisions must be read, whenever possible, to avoid such "potentially intrusive" results.

As discussed in the Introduction, the exercise of prosecutorial discretion under the Clean Air Act will be vastly more important than under any other environmental statute. EPA has recognized that exercising such discretion will be a routine part of its enforcement of numerous requirements applicable to large numbers of emission units at regulated facilities. Under the plain language of the statute, only where a noncompliance concern exists that justifies injunctive relief to achieve compliance are citizen suits permissible, whether under the "alleged to be in violation" or under the alleged "repeated violation" jurisdictional requirements. This interpretation should reduce the otherwise disruptive impacts on EPA's authority to enforce the Clean Air Act's requirements.

Finally, section 304(a)(1) should be read as not authorizing citizen suits for the recovery of civil penalties based on past violations that are not ongoing because the provision otherwise would clearly run afoul of Article III standing requirements. As we discuss under Point C, *infra*, a citizen may bring suit only if it can satisfy the injury-in-fact and redressability requirements for Article III standing. Allowing citizens to bring suit to recover civil penalties for past violations that are not ongoing would be inconsistent with these fundamental jurisdictional prerequisites.

B. The 60-Day Notice Requirement In Section 304(b)(1) Continues To Provide A Period During Which Past Violations Can Be Cured.

This Court's decision in *Gwaltney* relied in part on the conclusion that construing section 505 of the Clean Water Act to allow citizen suits for past violations that are not ongoing "would render incomprehensible § 505's notice provision, which requires citizens to give 60 days' notice of their intent to sue to the alleged violator as well as to the Administrator and the State." 484 U.S. at 59. The Court explained that the purpose of the 60-day notice requirement is to give the alleged violator an opportunity to bring itself into compliance and thereby preclude the need for citizens to file suit. The Court pointed out that the notice requirement would become "gratuitous" if a citizen suit could be based on violations which necessarily cannot be remedied within the 60-day period because they are not ongoing violations. *Id.* at 60. Based in part on this role of the 60-day notice provision, the Court concluded that section 505 of the Clean Water Act should be read as only authorizing the filing of citizen suits based on ongoing violations.

In the instant case, the Seventh Circuit stated that this aspect of the *Gwaltney* decision had been made less compelling by Congress' action in amending section 304(a)(1) of the Clean Air Act in 1990 to add the phrase "to have violated (if there is evidence that the violation has been repeated)." Pet. App. A13. The Seventh Circuit believed it significant that Congress amended section 304(a)(1) but left intact the 60-day notice requirement in section 304(b)(1), which is essentially identical to the notice requirement in the Clean Water Act. In the Seventh Circuit's view, the amendment to section 304(a)(1) authorized the filing of citizen suits based on past violations that are not ongoing. Therefore, according to that court, the existence of such a 60-day notice requirement in a citizen suit provision can no longer be

used as evidence that Congress intended that citizen suits be based solely on ongoing violations. *Id.*

The Seventh Circuit wrongly interpreted the import of Congress' revision of section 304. There are at least two reasons why Congress did not need to alter the 60-day notice provision in section 304(b).

First, the 60-day notice provision continues to provide an opportunity for defendants who are alleged "to be in violation" to cure the violation. This is the case even though Congress added language to section 304(a)(1) authorizing citizen suits under additional circumstances. It is unremarkable that Congress left the notice provision intact.

Second, Congress did not change the 60-day notice provision because it, in fact, did not intend to authorize the filing of citizen suits based on past violations that are not ongoing. This further supports the proffered interpretation of "repeated violation." As shown above, the most reasonable reading of amended section 304(a)(1) is that Congress intended that a past violation can provide the basis for a citizen suit only if it has been repeated under circumstances where there is a virtual certainty that the same violation will recur in the future unless the problem causing the violation is corrected. Under this interpretation, the notice requirement gives the alleged violator the opportunity to correct the non-compliance problem within 60 days and to show that injunctive relief is not necessary to bring the source into compliance. In short, this interpretation of the statute avoids making the notice requirement "incomprehensible" in accordance with *Gwaltney* and demonstrates that Congress' amendment of section 304(a)(1) in 1990 is consistent with its decision to leave the notice requirement unchanged.

C. Interpreting Section 304(a)(1) To Authorize Citizen Suits To Recover Civil Penalties For Violations That Are Not Ongoing Would Violate The Case Or Controversy Requirement Of Article III Of The Constitution.

Standing is a "threshold question in every federal case," for it determines "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This Court has made clear that the "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In order to establish Article III standing, a would-be plaintiff must make the following three-part showing: (1) that it or its members have personally "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (2) that the injury "fairly can be traced to the challenged action," and (3) that the injury is "likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted).

Section 304(a)(1) of the Clean Air Act must be interpreted in the narrow fashion reviewed above to comport with Article III standing requirements. As this Court reiterated in *Gwaltney*, a plaintiff bringing an action under a federal citizen suit provision must satisfy the Article III standing prerequisites.⁹ 484 U.S. at 65-67. As we show below, interpreting section 304(a)(1) as authorizing citizens to bring suit to recover civil penalties for violations

⁹ In *Gwaltney*, both Justice Marshall, writing for the majority, and Justice Scalia, writing the concurring opinion, recognized that Article III standing must be established by a citizen-plaintiff. Their only disagreement in this regard concerned the timing under which a citizen-plaintiff would actually be required to offer proof to support its allegations of harm and redressability.

that do not necessitate injunctive relief would run afoul of the Article III "case or controversy" requirement.¹⁰

1. *A citizen-plaintiff seeking to recover civil penalties can only satisfy the injury-in-fact requirement for Article III standing where a real noncompliance problem exists.*

Under Article III, a plaintiff must allege that it has personally been harmed in an identifiable manner and that it continues to be adversely affected at the time of filing the lawsuit. *Los Angeles v. Lyons*, 461 U.S. 95, 101-03 (1983). To establish the requisite injury-in-fact, the plaintiff must have suffered an invasion of a legally protected interest which is "concrete and personalized" as well as "actual or imminent." *Defenders of Wildlife*, 504 U.S. at 560 (citations omitted).

A citizen attempting to rely on violations that are not ongoing to bring suit under section 304(a)(1) cannot properly allege that there are "present adverse effects" from the violations which constitute the "concrete and personalized" harm required to establish Article III standing. Absent a real noncompliance problem, there are no

¹⁰ The United States agreed with this position in its *amicus curiae* brief in the *Gwaltney* case:

A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability.

Brief of the United States as *Amicus Curiae* Supporting Affirmance at 21, n.34. However, the government maintained that a citizen plaintiff would lack Article III standing to seek civil penalties for violations that are not such ongoing violations. The government stated that, if Congress "—oblivious to Article III's requirement that a litigant have a personal stake in the controversy—" were to give citizens authority to bring actions seeking penalties for violations that are not ongoing, "it would intrude upon the Executive's responsibility to 'take Care that the Laws be faithfully executed' U.S. Const. Art. III, § 3) and the prosecutorial discretion inherent therein." *Id.* (citation omitted).

present effects on a citizen. To demonstrate the necessary present effects, the citizen-plaintiff must show an ongoing violation and noncompliance requiring injunctive relief to compel compliance. Otherwise, it does not have standing to seek civil penalties.

Even if a citizen-plaintiff could show that it was injured in the past from a particular violation, that will not establish that the citizen-plaintiff has standing to bring an action. The injury to the plaintiff must exist at the time the complaint is filed and must continue until disposition of the case. *Sosna v. Iowa*, 419 U.S. 393, 402 (1974). As this Court has stated, "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lyons*, 461 U.S. at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

To invoke the jurisdiction of the federal courts, a plaintiff must "stand to profit in some personal interest." *Allen v. Wright*, 468 U.S. 737, 766 (1984) (citation omitted). A citizen-plaintiff relying on violations that are not ongoing cannot personally profit from its lawsuit. As this Court made clear in *Defenders of Wildlife*, a citizen's generalized grievances concerning enforcement of the laws do not satisfy the injury-in-fact test under Article III. 504 U.S. at 573-74.

It is important to bring to this Court's attention the fact that many courts have interpreted and applied the *Gwaltney* decision in ways that are inconsistent with the language and reasoning of the Court's opinion and that improperly allow citizens to recover civil penalties for violations that are not ongoing. For example, some judges have ruled that, for purposes of the jurisdictional determination under section 505(a) of the Clean Water Act, a good-faith allegation that there is an ongoing violation of one pollutant parameter in a facility's permit is sufficient to establish jurisdiction over past violations of other

parameters regulated by the permit. *Public Interest Research Group of New Jersey v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164, 1173-76 (D. N.J. 1993); *Public Interest Research Group of New Jersey v. Yates Industries, Inc.*, 790 F. Supp. 511, 514-16 (D. N.J. 1991).

This so-called "permit-based" approach ignores the fact that an alleged violation of one permit limit may well be totally unrelated to past violations of other, distinct permit limits and that those past violations may have already been cured. Accordingly, it directly conflicts with *Gwaltney's* holding that citizen suits are to address only those ongoing violations where injunctive relief is required.¹¹ In light of the much greater number of potential sources of violations under the Clean Air Act at a large facility, this problem will be much more acute under that statute than under the Clean Water Act. By ruling that actions for civil penalties are only permissible for violations for which injunctive relief is necessary to compel compliance, this Court will diminish the likelihood that citizen suits will commonly be allowed where there are not real "ongoing" violations.

2. The payment of civil penalties by a defendant for violations that are not ongoing would not redress private citizens' alleged injuries.

To satisfy Article III, a plaintiff must show not only that it has suffered an injury but also that "it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.'" *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 38, 43 (1976)). A citizen-plaintiff seeking to recover civil penalties based

¹¹ As discussed previously, courts have improperly interpreted the *Gwaltney* opinion's reference to "intermittent" violations as authorizing actions for civil penalties where there is no ongoing violation of the same requirement and injunctive relief is thus not necessary.

on past violations that are not ongoing could not satisfy the redressability prong of the three-part standing test.

The principal relief which would be requested in such an action—an order directing the defendant to pay civil penalties to the government—would not redress any injury suffered by the plaintiff. To establish standing, a plaintiff “must stand to profit in some personal interest.” *Allen v. Wright*, 468 U.S. at 766 (citation omitted). The payment of penalty amounts to the government would not benefit the citizen-plaintiff in any personal way which could be differentiated from the benefit to the public at large. Certainly, the payment cannot be said to redress any concrete injury to the citizen-plaintiff.

Moreover, there is no other element of such a citizen suit that would redress any concrete injury allegedly suffered by a citizen-plaintiff. It is well-established that the redressability requirement of Article III cannot be satisfied by an interest in general deterrence or law enforcement, no matter how keenly held. *Diamond v. Charles*, 476 U.S. 54, 64-65 (1986). Money damages may not be awarded to the plaintiff in a citizen suit. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1, 17-18 (1981). Recovery of attorneys’ fees and litigation costs cannot satisfy the redressability test. *Diamond v. Charles*, 476 U.S. at 70-71. In short, a citizen-plaintiff seeking to recover civil penalties based on past violations that are not ongoing will not be able to meet the redressability test required by Article III.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Clean Air Implementation Project urges that the Court reverse the decision below. In addition, CAIP requests that the Court make clear that citizen suits may only be brought where there is an ongoing violation and that the test for determining whether an ongoing violation exists is that injunctive relief must be necessary to compel compliance with applicable requirements. Otherwise, the private citizen would not have standing under Article III to bring the action.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

*On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit*

**BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996**

No. 96-643

The Steel Company, a/k/a
Chicago Steel and Pickling Company,
Petitioner,

v.

Citizens for a Better Environment,
Respondent.

*On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit*

**BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

INTERESTS OF AMICI CURIAE¹

The Washington Legal Foundation ("WLF") is a non-profit, public interest law and policy center based in

¹ Pursuant to Supreme Court Rule 37.6, amicus hereby indicates that no counsel for a party in this case authored this amicus brief in whole or in part.

Washington, D.C., with supporters nationwide. WLF is dedicated to supporting the free enterprise system and promoting the principles of judicial restraint and separation of powers. To this end, WLF has appeared in this Court as *amicus curiae* on numerous occasions, particularly in environmental cases that raise issues relevant to this case. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts by reference the Statement of the Case as presented in the brief of the Petitioner. In short, this case presents the Court with the issue of whether the citizen suit provision of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, authorizes persons to file suit against companies for reporting violations that were cured before the citizen suit was filed, and where there are no allegations that the violations would likely occur again. This issue necessarily entails the constitutional question of whether the plaintiff in this and similar cases has standing under Article III to invoke the jurisdiction of federal courts.

SUMMARY OF ARGUMENT

EPCRA does not authorize citizen suits for violations that have occurred in the past and that have been *fully corrected* by the time suit is filed. Rather, a fair reading

of the statutory language, this Court's controlling authority, and the legislative history underlying the development of "citizen suit" provisions generally compels the conclusion that Congress intended that the citizen suit provision in EPCRA would only authorize suits for ongoing violations.

Furthermore, a citizen plaintiff suing for wholly past violations of EPCRA simply does not have standing under Article III of the Constitution. First, the citizen plaintiff cannot establish a specific injury-in-fact arising from the alleged loss of information. Second, even if an injury-in-fact could be shown, none of the remedies available to the citizen plaintiff under the statute would redress the alleged informational injury. Indeed, at the time suit is filed for historic or wholly past violations, the citizen plaintiff has the information which was allegedly wrongfully withheld. As the citizen plaintiff cannot sue for money damages under EPCRA, federal courts are without power to fashion any further remedy.

Lastly, allowing citizen suits for wholly past violations of EPCRA violates the separation of powers doctrine. Article II of the Constitution provides that the Executive has the authority to enforce the laws. Suits to enforce wholly past violations can only serve the public interest, and such enforcement powers is the essence of Executive power. Authorizing citizen suits to exercise such enforcement powers constitutes a usurpation of Executive powers by Congress, undermines this authority, and impermissibly dissipates the Executive's prosecutorial powers. EPCRA's citizen suit provision should be interpreted to avoid this serious constitutional question.

ARGUMENT

I. CONGRESS DID NOT INTEND EPCRA TO PERMIT CITIZEN SUITS FOR WHOLLY PAST REPORTING VIOLATIONS

In determining whether the citizen suit provision of EPCRA, 42 U.S.C. § 11046, allows a citizen plaintiff to bring suit for wholly historic violations, one must look first to the language and structure of the statute, and only if the statute is unclear, to the legislative history of the statutory provision in question. Amicus submits that a fair reading of the law demonstrates that Congress did not intend to permit citizen suits for EPCRA violations that have been corrected.

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), this Court found that the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365, did not authorize suits for wholly historic violations. Remarkably, using what it described as the same analytical approach to determine the meaning of a similar citizen suit provision in EPCRA, the court of appeals below reached the opposite result, holding that EPCRA does authorize such suits.

In reaching its decision, the Seventh Circuit engaged in "hypertechnical parsing"² of the language of the relevant sections of EPCRA in order to distinguish similar language

² *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 476 (6th Cir. 1995) (rejecting as "hypertechnical parsing" attempts to distinguish between citizen suit provisions of EPCRA and CWA).

used in the CWA. EPCRA authorizes suits against a company "for failure to" file certain reports, 42 U.S.C. § 11046(a)(1)(A), whereas the CWA and a number of other environmental laws authorize suits against companies alleged "to be in violation" of the respective substantive statutes. See, e.g., 33 U.S.C. § 1365(a)(1).

Amicus submits that the lower court failed to appreciate a key difference between the CWA and EPCRA. CWA and similar statutes require that action be taken every day to assure compliance with their substantive requirements. Because compliance is required daily, violations may be ongoing and continuous. EPCRA, on the other hand, is a purely a reporting statute requiring the filing of certain forms once a year. Once the forms have been filed, whether a day, month, or year late, the company ceases to "fail" to file the required reports.

Amicus further notes that the same "for failure to" language which the lower court concluded authorizes citizen suits for wholly past violations against companies is also used to permit suits against the EPA Administrator, a State Governor, or a State emergency response commission for their failure to comply with certain duties under EPCRA. For example, the EPA Administrator can be sued by a citizen for failing to "publish inventory forms" within a certain period of time, 42 U.S.C. §11046(a)(1)(B)(i), or for failing to respond to a petition to add or delete a chemical to its inventory list within 180 days. 42 U.S.C. §11046(a)(1)(B)(ii). Likewise, a State Governor or State emergency response commission can be sued for failure to provide certain information to a requester within 120 days after the request. 42 U.S.C. §11046(a)(1)(D).

Surely, Congress did not intend that citizen plaintiffs be permitted to sue the EPA Administrator or State Governor *after* those officials carried out their duties simply because they were tardy in doing so. Rather, Congress provided in EPCRA that the district courts would have jurisdiction "to enforce the requirement concerned" that companies have failed to comply with, and to order the Administrator "to perform the act or duty concerned." 42 U.S.C. § 11046(c). This remedial language suggests that Congress intended citizen suits to enjoin current or ongoing violations, rather than to waste scarce judicial resources issuing meaningless declaratory judgments that past violations have occurred but have been corrected.

Indeed, the Seventh Circuit's zeal to find that EPCRA permits suits for wholly past violations led it to conclude that the word "occurs," as used in EPCRA,³ is not "cast in the present tense." *Citizens For A Better A Environment v. The Steel Company*, 90 F.3d 1237, 1244 (7th Cir. 1996).

Yet even the Respondent concedes that, except for EPCRA and the Clean Air Act (which will be discussed *infra*), all the other major environmental statutes require that a plaintiff "must allege an ongoing violating" of those statutes. Opp. Cert. at 3. If this is true, it seems odd that Congress would provide for *fewer* opportunities for citizen suits in those substantive environmental laws. As one commentator aptly put it:

³ See 42 U.S.C. § 11046(d)(1) (copy of 60-day notice by plaintiff is to be given to the State in which "the alleged violation occurs").

[I]t should be noted that violators of the . . . CWA, unlike EPCRA violators, do not wholly undo the effects of their past violations simply by coming into present compliance. Accordingly, if Congress did not deem nonrecurring violations of these substantive health protections to warrant citizen suits, it is difficult to understand why it would have treated nonrecurring violations of a reporting statute more harshly. By the same token, the argument of diminished deterrence fails to demonstrate why Congress would depart from the structure of its major environmental statutes to seek greater deterrence of reporting violations than substantive violations.

B. Cohen and D. Haire, *Environmental Citizen Suits: Standing and the Proper Scope of Relief; Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy*, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST 49 (July 1996) (hereinafter cited as "Cohen and Haire").

Amicus will not repeat the other compelling statutory construction arguments made by Petitioner in this case. Amicus does wish to point out, however, two statutory provisions common to all citizen suit provisions. Those provisions compel, as a constitutional matter, that if there is any doubt about whether EPCRA authorizes citizen suits for wholly past violations, those doubts should be resolved against finding such authorization.

First, each of the major environmental laws authorizing citizen suits specifically limits such actions to those filed by

a citizen "on his own behalf."⁴ As further explained below, a suit filed for wholly past violations that have been corrected, necessarily is brought on the public's behalf, since there is no injunctive relief that could be granted to benefit the individual. At the heart of the exercise of the Executive's power under Article II is the power to enforce laws on behalf of the public. By expressly providing that citizen suits may be brought only on the citizen's own behalf, Congress recognized the important Article II constitutional interest that must be preserved, and concomitantly, the limits on its power to infringe on that protected interest.

Second, each of the noted statutes specifically precludes such actions unless and until the party being sued is given 60-day notice of such suit.⁵ In *Gwaltney*, this Court found that the requirement of 60-day notice prior to initiating a citizen suit was enacted to allow compliance with the CWA and render such a suit unnecessary, and is

⁴ See EPCRA, 42 U.S.C. §11046(a)(1); CWA, 33 U.S.C. §1365(a); Clean Air Act (CAA), 42 U.S.C. §7604(a); Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §1270(a); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9659(a); Solid Waste Disposal Act (SDWA), 42 U.S.C. §6972(a); Toxic Substances Control Act (TSCA), 15 U.S.C. §2619(a); and Endangered Species Act (ESA), 16 U.S.C. §1540(g).

⁵ Virtually identical 60-day notice requirements exist under EPCRA, 42 U.S.C. §11046(d); CAA, 42 U.S.C. §7604(b); CERCLA, 42 U.S.C. §9659(d)(1); SMCRA, 30 U.S.C. §1270(b)(1); SDWA, 42 U.S.C. §6972(b); ESA, 16 U.S.C. §1540(g)(1)(C).

further evidence that the Congress enacting this provision did not intend that it be used to bring an action for wholly past violations. The Court reasoned that:

it follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous.

Gwaltney, 484 U.S. at 60.

Instead of following the straightforward and direct analytical approach of this Court in *Gwaltney*, the lower court embarked on a wholly inappropriate examination of the legislative history of the CAA, enacted years after EPCRA, by a different Congress. Specifically, in 1990, Congress amended the CAA to expressly allow for citizen suits for violations of that law that began in the past, but only "if there is evidence that the alleged violation has been repeated." 42 U.S.C. §7604(a)(1)(3). Remarkably, the Seventh Circuit interpreted this amendment of an unrelated statute to allow for suits in the case of intermittent violations as a repudiation of this Court's reasoning in *Gwaltney* and support for the holding that EPCRA authorizes suit for wholly historical violations. *Citizens For A Better Environment*, 90 F.3d at 1244.

Courts should and do have reservations about the use of legislative history as a means of determining Congressional intent. See *United States v. O'Brien*, 391 U.S. 367, 383-384, *reh'g denied*, 393 U.S. 900 (1968)

("inquiries into congressional motives or purposes are a hazardous matter. . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . ."). "The judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

It is particularly hazardous to rely on the inaction of Congress in an attempt to discern legislative intent. Instead of relying on the intent of the enacting Congress, the lower court impermissibly focused on a subsequent Congress' intent. See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). Inferring from the inaction of Congress in failing to amend the notice provision of the CAA in 1990 that Congress thereby intended EPCRA's citizen suit provision to apply to wholly historic violations flies in the face of well-settled jurisprudence of statutory interpretation, not to mention common sense.

Not only does this interpretation impute to the enacting Congress the presumed intent of a subsequent one, it infers this intent from the inaction of Congress in amending a *wholly different statute*. Congress reasonably may have intended the CAA, a statute which imposes ongoing daily (and even hourly) obligations to limit certain air emissions, to allow suits for certain intermittent and recurring violations. EPCRA imposes a once-a-year obligation to file certain forms. As the court in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995) stated:

[O]ne can argue with at least equal force that by amending the Clean Air Act, but failing also to amend EPCRA, Congress intended to limit EPCRA's citizen suit provisions to violations existing at the time the suit is filed We discern nothing in the legislative history [of EPCRA] that indicates that Congress intended to allow citizens to sue [for past violations].

Id. at 477. Amicus submits that for this reason alone, the legislative history of CAA, gleaned from events that took place in Congress in 1990, is irrelevant to the determination of legislative history of EPCRA which was enacted in 1986.

To compound its error, the court of appeals got the legislative history of the CAA wrong. Congress and the Executive were justifiably concerned about the possible unconstitutionality of the proposed 1990 CAA amendments, and that these concerns were dealt with by requiring that the citizen plaintiff show in a suit under the CAA, at minimum, that the alleged violation "has been repeated" rather than constitute a wholly historic violation. 42 U.S.C. § 7604(a)(1).

In a letter to the Senate, then Attorney General Richard Thornburgh expressed the Executive Branch's concern that a provision allowing citizen suits for wholly past violations would "raise important questions under Article II and Article III of the Constitution." Cong. Rec. S5282 (1990). One Senator pointed out that "the citizen plaintiff lacks constitutional standing to sue for a past violation which presents no prospect of present or future harm." *Id.* at 6440-41 (1990). In signing the 1990 CAA amendments into law, President Bush reiterated those concerns:

[T]here are certain aspects of the bill's enforcement provisions that raise constitutional questions. I note that in providing for citizen suits for civil penalties, the Congress has codified the Supreme Court's interpretation of such provisions in the *Gwaltney* case. *As the Constitution requires, litigants must show, at minimum, intermittent, rather than purely past violations of the statute in order to bring suit.* This requirement respects the constitutional limitations on the judicial power and avoids an intrusion into the law-enforcement responsibilities of the executive branch.

Signing Statement, P.L. 101-549, November 19, 1990; PUB. PAPERS 1604 (1990) (emphasis added).⁶

Construing EPCRA to allow suits for wholly historic violations creates constitutional issues under both Article II and Article III, as further explained below, and violates the well-established rule that a statute should be construed in order to avoid constitutional questions. *See Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2237 (1995) ("we ordinarily should construe statutes to avoid serious constitutional questions"). Rather than presuming that "Congress, which also has sworn to protect the Constitution, would intend to err on the side of

⁶ Statements made in Presidential Signing Statements are relevant to ascertaining legislative intent. *See D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658 (4th Cir. 1969) (relying on President Truman's signing statement, as well as congressional statements, in interpreting the Portal-to-Portal Act); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976) (considering signing statement in determining the possible breadth of the trade secrets exception under the Freedom of Information Act).

fundamental constitutional liberties when its legislation implicates those liberties," *Regan v. Time, Inc.*, 468 U.S. 641, 697 (1984), the lower court and the Respondent would have this Court presume that Congress intended to draft EPCRA in such a way so as to create serious constitutional issues.

Accordingly, amicus submits that Congress did not intend that EPCRA would authorize citizen suits against companies, or against the EPA for that matter, for wholly historic reporting or other violations that were cured before suit was filed.

II. CITIZEN PLAINTIFFS DO NOT HAVE ARTICLE III STANDING TO BRING AN ACTION FOR WHOLLY PAST VIOLATIONS OF EPCRA

Even if Congress did intend EPCRA to authorize citizen suits for wholly past violations, Article III of the Constitution prohibits federal courts from entertaining those suits because the plaintiffs lack standing to bring them.

The doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process. A threshold issue in every federal case is whether the plaintiff has made out a justiciable case or controversy within the meaning of Article III of the Constitution of the United States. *See Warth v. Seldin*, 422 U.S. 490 (1975). The party invoking federal jurisdiction has the burden of establishing Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 505, 559 (1992). Amicus submits that even if Congress intended to authorize citizen suits for wholly historic violations of EPCRA, the citizen plaintiff would not have standing under Article III.

The concept of standing does not refer simply to the party's capacity to appear in court; rather, standing is gauged by the specific common-law, statutory or constitutional claims the party presents. See *International Primate Protection League v. Admin. of Tulane Educational Fund*, 500 U.S. 72 (1991). Although some of the elements of standing are prudential, the "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Defenders of Wildlife*, 504 U.S. at 560. The irreducible constitutional standing requirements consist of three elements: injury in fact, causation and redressibility. *Id.* at 560.

This Court has explicitly stated that Article III does not recognize a "congressional conferral upon all persons of an abstract, self contained, non-instrumental 'right' to have the Executive observe the procedures required by law." *Id.* at 573. See also *Warth*, 422 U.S. at 501 (although Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules, it cannot eliminate the Article III standing requirements); Scalia, *Doctrine of Standing*, 17 Suffolk U. L. Rev. 881, 885 (1983) (Article III core standing requirements create a constitutional minimum which cannot be eliminated by Congress).

In *Gwaltney*, while this Court found that the citizen suit provision of CWA did not allow suits for wholly past violations, it remanded the case to the lower courts to determine whether the plaintiff's complaint "contained a good-faith allegations of ongoing violation" by the company. 484 U.S. at 64. In sharp contrast, CBE did not even allege any ongoing or continuing violations by the company. See Pet. A25. Accordingly, CBE lacks standing to bring this case.

A. Wholly Past Violations of EPCRA Cannot Create An Injury In Fact

The first element which a plaintiff must establish to show Article III standing is that it has suffered an injury-in-fact. "Injury-in-fact" has been defined by this Court to mean "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Defenders Of Wildlife*, 504 U.S. at 560 (citations and quotations omitted). Furthermore, this Court has held that a mere interest in a problem, no matter how long-standing or sincere, is not sufficient by itself to establish an injury-in-fact. See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). As this Court explained:

[T]he requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.

Id. at 740.

Although Congress may grant an express right of action to persons who would otherwise be barred by prudential standing rules, "Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth*, 422 U.S.

at 501.⁷ Thus, EPCRA's provision that "any person" may commence a civil suit for failure to file the required reports is not sufficient to satisfy the requirement of injury-in fact under Article III. See 42 U.S.C. § 11046(a); *Defenders of Wildlife*, 504 U.S. at 563 ("[b]ut the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured").

⁷ Amicus submits that the language in EPCRA which provides that a "person" may sue for violations "on his own behalf," is clear evidence of Congress' intent to limit standing or the scope of a private right of action under EPCRA. In its complaint, CBE alleges that it is suing on "behalf of *both* itself and its members." CBE Complaint ¶ 6, J.A. 4 (emphasis added). EPCRA, however, expressly authorizes a person, including an entity, to bring a suit only on his or its own behalf and not on behalf of third parties or the government, such as a *qui tam* lawsuit. See discussion, *supra*, at 7-8.

With respect to the prudential aspect of standing, it is true that this Court has permitted third parties or organizations to raise representational standing where their members could have shown Article III standing in their own right. See, e.g., *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333 (1977). While Congress is free to eliminate *all* prudential barriers to standing by providing for citizen suits without qualification (save, of course, for limits under Article III), Congress is also free to keep or place one or more such prudential barriers in the law, and Congress has done so here. Accordingly, allegations in CBE's complaint with respect to alleged injuries suffered by its members cannot properly form a basis for a suit under EPCRA. While neither CBE nor its members suffer Article III injury-in-fact in this case, CBE can sue under EPCRA, if at all, only on its own behalf.

EPCRA has two primary purposes: (1) to compile accurate, reliable information on the presence and release of toxic chemicals and to make that information available on a localized level and (2) to use the reported information to formulate emergency response plans by state and local response groups. *Citizens For A Better Environment*, 90 F.3d at 1239. At least one commentator has noted that under EPCRA, a citizen plaintiff must show an "informational injury" in order to establish an Article III injury-in-fact. See Shalvelson, *EPCRA, Citizen Suits and the Sixth's Circuit Assault of the Public's Right-To-Know*, 2-Fall Alb. L. Envtl. Outlook 29, 33 (1995).

This Court has never explicitly recognized the sufficiency of informational standing for Article III purposes. In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990), this Court noted that mere adverse effects as a result of lack of information would not be sufficient to create standing; rather the plaintiff must be able to show a particularized injury suffered as a result of the lack of information. *Id.* See also Gatchel, *Informational and Procedural Standing After Lujan v. Defenders of Wildlife*, 11 J. Land Use & Envtl. L. 75, 86 (1995) ("Informational standing is granted only to groups that can show 'specific facts' which prove that they normally use the information."). This limitation is consistent with the traditional standing requirement that

a plaintiff show a concrete injury to its specific interests.⁸

Where, as in the instant case, the plaintiff alleged wholly past violations of EPCRA and is seeking only a declaratory judgment, the imposition of civil penalties payable to the U.S. Treasury, and attorneys' fees, informational injury cannot form the basis of an Article III injury-in-fact. Any "injury" suffered due to lack of information as a result of a defendant's wholly historic failure to file reports required by EPCRA is a past injury that has been corrected.

It is well-established that past injuries are not sufficient to satisfy the injury-in-fact requirement of Article III in the absence of a claim for money damages. See *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (in dismissing Lyons' claim for injunctive relief, the Court found that Lyons could not establish that he would suffer the same injury again and, therefore, was no more entitled to injunctive relief than any other citizen);

⁸ CBE's Complaint merely alleges that The Steel Company, in filing late EPCRA reports, "has deprived citizens, including members of CBE, of information. . ." Complaint, ¶ 1; J.A. at 2. CBE also alleges that the past failure of The Steel Company to file the reports under EPCRA "defeated the purposes of EPCRA, which are to inform people, annually and in a timely manner, about the presence of hazardous chemicals, to assist in local emergency planning and response, and to aid in the development of appropriate regulations, guidelines and standards" Complaint, ¶ 20; J.A. at 8. These "injuries" appear to be generalized injuries suffered by all the residents of the Chicago area, which would not satisfy the traditional injury-in-fact requirement.

O'Shea v. Littleton, 414 U.S. 488, 496 (1974) (past wrongs are probative of whether there is a real and immediate threat of repeated injury, however, plaintiffs have standing only when their injuries are real and immediate enough to show an existing controversy).

EPCRA does not authorize a citizen plaintiff to seek money damages for any economic losses suffered by the lack of the information. Therefore, under this Court's teaching, absent a showing of a real and immediate threat of future violations, a citizen plaintiff cannot satisfy the requirement of injury-in-fact under Article III merely by alleging wholly past violations of EPCRA. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 70 (Scalia, J., concurring in part and concurring in the judgment) ("If it is undisputed the defendant was in a state of compliance when this suit was filed, the plaintiff would have been suffering no remediable injury in fact that could support suit.").⁹ Indeed, even the majority in *Gwaltney* opined that allegations of historically recurring violations could be rendered moot if there "is no reasonable expectation that the wrong will be repeated." *Id.* at 66.

⁹ CBE attempts to distinguish this case from one in which the failure to file was corrected *prior* to the receipt of notice from a citizen plaintiff. Opp. Cert. at 13-14. This distinction is irrelevant. First, for Article III purposes, whether an injury constitutes a "past" violation does not depend on the length of time between the alleged injury and the filing of suit. Second, the Question Presented upon which the Court granted review did not make a distinction between pre- and post-notice late filers. Finally, the court of appeals rationale permitting suits for past violations would appear to apply to all late filings, regardless of whether notice was first provided.

In the final analysis, the filing of the EPCRA reports in this case, however late, moots any controversy in the same way, for example, that the delayed release of agency documents to a requester under the Freedom of Information Act would moot any subsequently filed lawsuit complaining that the agency's response was untimely because it did not occur within the 10-day period as required by FOIA. See 5 U.S.C. § 552(a)(6)(A)(i). Indeed, EPCRA, unlike FOIA, does not even require that the information be provided to CBE or any individual who requests the information; rather, EPCRA requires that the forms be filed with certain government agencies, 42 U.S.C. §§ 11022(a), 11023(a). None of these agencies have sued The Steel Company, presumably because the company promptly complied with EPCRA after it first learned of EPCRA's requirements from the 60-day notice, and continues to comply today.

B. A Citizen Plaintiff Cannot Establish Redressibility For Wholly Past Violations Of EPCRA

In addition to establishing injury-in-fact, in order to have Article III standing a citizen plaintiff must satisfy the redressibility prong of standing, or, in other words, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560. (citations omitted) (quotations omitted). The requirement of redressibility discourages advisory opinions and restrains courts from deciding cases when a favorable outcome will not operate to make the petitioning party whole. See *Guilds, A Jurisprudence of Doubt: Generalized Grievances As A Limitation to Federal Court Access*, 74 N. C. L. Rev. 1863, 1875 (1996). A favorable judgment must redress the

injured plaintiff even while serving a general public goal. See *Allen v. Wright*, 468 U.S. 737, 758 (1984).

Assuming, *arguendo*, that a citizen plaintiff who brings suit for wholly historical violations of EPCRA can, at most, claim a temporary informational injury, EPCRA provides no remedies that would redress that injury. Citizens may seek injunctive and declaratory relief and civil penalties that are payable only to the U.S. Treasury. 42 U.S.C. § 11046. The court also has discretion to award costs and fees to the prevailing party in a proper case. *Id.* Yet none of these possible prospective "reliefs" will remove the harm allegedly suffered by the citizen plaintiff due to the untimely filing, and which has already been cured. See *Warth*, 422 U.S. at 505 (Article III requires that the prospective relief will remove the harm alleged by the plaintiffs).

As this Court stated in *Defenders of Wildlife*, such generalized grievances do not satisfy Article III:

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the constitution and laws, and *seeking relief that no more directly and tangibly benefits him than it does the public at large*—does not state an Article III case or controversy.

Defenders of Wildlife, 504 U.S. at 573-74. (emphasis added).

A few district courts have found redressibility for wholly past violations of EPCRA based on the deterrent

effect of the civil penalties or the possibility of enjoining the reporting company from violating the statute in the future, as well as the award of attorneys' fees and costs. See, e.g., *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972 (D. Ariz. 1997). These cases are clearly at odds with this Court's precedents. This Court has held, for example, that the possibility of an award of attorneys' fees is not sufficient to satisfy Article III standing. See *Lewis Continental Bank v. Lewis*, 494 U.S. 472 (1990) (interest in attorneys' fees under civil rights statutes is insufficient to create Article III case or controversy where none exists on the merits of the underlying claim).

Furthermore, the possible deterrent effect of civil penalties or an injunction against future violations is too speculative to satisfy the redressibility requirement as articulated by this Court. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court considered the standing of indigents who challenged the designation of certain hospitals as "charities" for tax purposes. In finding that the plaintiffs had failed to establish standing, the Court stated:

The complaint only alleged that petitioners, by the adoption of Revenue Ruling 69-545, had "encouraged" hospitals to deny services to indigents. The implicit corollary of this allegation is that a grant of respondents' requested relief . . . would "discourage" hospitals from denying their services to respondents. But it does not follow from the allegation and its corollary that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy would

result in these respondents' receiving the hospital services they desire.

Id. at 42, 43. (emphasis added). Likewise, the possible deterrent effect of the imposition of civil penalties is wholly speculative, particularly when the citizen plaintiff has made no allegations -- and in this case, could not make any allegation -- that a recurring violation is likely. In short, when a citizen plaintiff brings suit for wholly past violations of EPCRA, no action by the court can remove the harm allegedly suffered by the plaintiff.¹⁰ See also Abell, *Ignoring the Trees for the Forests: How The Citizen Suit Provision of The Clean Water Act Violates The Constitution's Separation of Powers Principle*, 81 Va. L. Rev. 1957, 1982 (1995) (arguing that the possible deterrent effect of civil penalties and injunctions imposed as a result of a citizen suit under the Clean Water Act does not satisfy the redressibility requirement of Article III, as defined by this Court).

¹⁰ Claims for past violations of EPCRA also are barred by the related doctrine of mootness, as any violation is cured prior to the filing of suit. See *Warth*, 422 U.S. at 499 n.10 (standing question bears a close affinity to that of mootness, i.e., whether the occasion for judicial intervention persists). A case is moot and not justiciable when the issues presented are no longer "live" or when the parties no longer have a legally cognizable interest in the outcome. As noted, *supra* at 19, this Court in *Gwaltney* noted that even allegations of ongoing violations can be mooted; *a fortiori*, claims only of wholly past violations that have been corrected are clearly moot.

III. CONSTRUING THE CITIZEN SUIT PROVISION UNDER EPCRA TO AUTHORIZE SUITS FOR WHOLLY PAST VIOLATIONS WOULD CONFLICT WITH FUNDAMENTAL SEPARATION OF POWERS PRINCIPLES

The Constitution allocates governing power among the three branches of government to "protect the liberty and security of the governed." *Metropolitan Washington Airports Auth. v. Citizens For The Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991). "The Constitutional's central mechanism of separation of powers depends largely upon a common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Defenders of Wildlife*, 504 U.S. at 559. Under this framework, Congress is given the responsibility to create laws, and the President cannot perform these primary legislative functions. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Conversely, the President is given the responsibility to enforce the laws or appoint agents charged with the enforcement of laws, and Congress cannot perform or usurp these primary executive functions. See *Buckley v. Valeo*, 424 U.S. 1, 123-24 (1976).

As Justice Scalia explained in *Defenders of Wildlife*:

Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. . . . To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to

permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."

Id. at 576, 577. While amicus recognizes that the Article II issue is not directly before the Court, the constitutional issue should nevertheless inform this Court's judgment with respect to the proper interpretation of EPCRA's citizen suit provision.

Allowing actions for wholly past violations under the citizen suit provision in EPCRA would constitute an unconstitutional usurpation of executive powers by Congress. The prosecution of cases to enforce public rights is, and always has been, a primary executive function. See *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive has exclusive authority and absolute discretion to decide whether to prosecute a case"). Therefore, transfer of the law enforcement power from the Executive to another entity is an unconstitutional invasion of the executive's primary constitutional function. See *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (the power not to prosecute or enforce laws is an integral part of the executive's constitutional duty to "take Care that the Laws be faithfully executed"). Congress may not pass a citizen suit provision that withdraws power from a co-equal branch and assign that power to a private citizen without a

personal stake in the controversy.¹¹

The grant of prosecutorial power to private citizens solely to vindicate public rights under EPCRA undermines the Executive's authority by transferring a unique prosecutorial function from the Executive branch to a private citizen. In *Morrison v. Olson*, 487 U.S. 654 (1988), this Court set forth the test for determining whether a delegation of prosecutorial power violated the separation of powers doctrine. In making the determination, the Court considered three areas of control by the Executive: the initiation of the action, the scope of the action, and the termination of the action. *Id.* at 650-1, 691-96.

The authorization of citizen suits for wholly past violations, such as the one brought by CBE, fails to satisfy the *Morrison* test. The Executive has very little authority to control the initiation of the suit. Although EPCRA provides that a citizen may not bring suit if EPA takes action within the 60-day notice period, this control is largely illusory. See 42 U.S.C. § 11046(e). Action by EPA bars the citizen suit only if the government has "commenced and is diligently pursuing an administrative order or civil action." *Id.* Similar provisions containing "diligently prosecuting" preclusions have been interpreted

¹¹ "The exercise of significant authority pursuant to the laws of the United States, including 'conducting civil litigation in the courts of the United States for vindicating public rights,'... may be carried out only by 'Officers of the United States,'... appointed in conformity with the Appointments Clause of the Constitution." Cohen and Haire, *supra*, at 31 (footnotes omitted). As previously discussed, this limitation is recognized in EPCRA, by expressly limiting citizen suits to those brought on the citizen's "own behalf."

very narrowly to exclude informal settlements and administrative solutions. See *Sierra Club v. Chevron U.S.A.*, 834 F. 2d 1517 (9th Cir. 1987); *Washington Area Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993) (EPA compliance order cannot preclude suit); *Natural Resources Defense Council v. Fina Oil & Chemical Co.*, 806 F. Supp. 145, 146 (E.D. Tex. 1992) (compliance order does not bar citizen suit; to bar citizen suit, there must be a court action).

Particularly in the context of wholly historical violations of EPCRA, EPA may determine that an informal resolution will best serve the government's interest in effectuating future compliance. The constitutionally based power of the Executive to enforce the law for the public good is eviscerated by the citizen suit provision if it were used to prosecute wholly past violations.

There is an additional potential Article II concern that the Court should consider. Not only does a citizen suit for wholly past violations constitute an improper exercise of a unique Executive Branch function, but to the extent that the suit seeks civil penalties that are payable only to the United State Treasury, it may violate the Appointments Clause of Article II. Recoupment of civil penalties for the Treasury is a power that may be exercised only by an officer of the United States. See *Confiscation Cases*, 74 U.S.(Wallace) 454, 458-59 (1868). As one commentator noted, "This principle, which flows from the public nature of the relief itself, would bar private actions for civil penalties, even if it could be established beyond question that those penalties indirectly benefited the citizen-plaintiff." Cohen and Haire, *supra*, at 31.

Significantly, the main argument which has been advanced to preclude citizen suits from violating separation of powers principles is that the Article III requirement of standing insures that the citizen plaintiff has a real and concrete interest in the action and that the governmental interest is merely incidental. As discussed at length above, this argument is unavailable when the citizen plaintiff attempts to bring a claim for wholly historical violations. *See also* Scalia, 17 Suffolk U. L. Rev. at 897-98 (the essential element that links the 'intimately related doctrines of standing and separation of powers is "the requirement of *distinctive* injury not shared by the entire body politic.") (emphasis in the original). As noted, *supra*, at 7-8, this fundamental principle is embodied by the limitation on citizen suits to those filed on the citizen's "own behalf."

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals, and reinstate the district court's judgment dismissing the action against The Steel Company.

Respectfully submitted,

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IN THE
**Supreme Court Of The
United States**

OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL
AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

**BRIEF OF AMERICAN FOREST & PAPER
ASSOCIATION, INC. AND THE NATIONAL
ASSOCIATION OF MANUFACTURERS AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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IN THE
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THE STEEL COMPANY, a/k/a CHICAGO STEEL
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**BRIEF OF AMERICAN FOREST & PAPER
ASSOCIATION, INC. AND THE NATIONAL
ASSOCIATION OF MANUFACTURERS AS *AMICI
CURIAE* IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICI CURIAE*

Amicus curiae American Forest & Paper
Association, Inc.¹ is a non-profit trade association for

¹ Pursuant to Rule 37 of the Rules of this Court, the *amici* have obtained letters of consent to the filing of this brief from the parties and have filed those letters with the Clerk of the Court. Additionally, pursuant to Rule 37, this brief was authored, prepared and paid for in its entirety by the *amici*.

over 250 member companies engaged in growing, harvesting, and processing wood and wood fiber and manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber, and solid wood products. Its member companies account for over 8 percent of the total U.S. manufacturing output. *Amicus curiae* the National Association of Manufacturers is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the National Association of Manufacturers through its Associations Council and National Industrial Council.

The *amici* represent companies which use certain chemicals in their manufacturing processes that are subject to the reporting requirements of sections 312 and 313 of EPCRA. Section 326 of EPCRA authorizes private citizens to sue alleged violators for violations of four specific reporting requirements, including failure to "complete and submit an inventory form" under section 312 and failure to "complete and submit a toxic chemical release form" under section 313.²

² Section 312 generally requires submittal of "hazardous chemical" inventory forms to the state emergency response commission, the local fire department, and the appropriate local emergency planning committee. 40 C.F.R. § 370.25 (1996). Section 313 requires submittal of "toxic chemical" release forms, also known as "Form R" reports, to EPA and to the state emergency response commission for any of the 651 specified chemicals. A separate Form R must be filed for each chemical released to the environment (as defined in EPCRA § 329(2), 42

If this court affirms the Seventh Circuit's decision and, by implication, rejects the Sixth Circuit's reading of the same statutory language,³ a new right to seek civil penalties for wholly past, corrected EPCRA violations will be grafted onto the statute. *Amici's* member companies that have been using their best efforts to comply with EPCRA could be vulnerable to citizen suits for good-faith reporting errors that EPA does not feel warrant punishment.

As representatives of a large segment of U.S. industry, the *amici* can help provide this Court with a broader perspective on the practical realities of EPCRA compliance and enforcement and the pernicious effects that the Seventh Circuit's decision could have.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision is contrary to the plain meaning of EPCRA section 326 and it fails to accurately analyze the Act's legislative history. Moreover, the Seventh Circuit's opinion renders the mandated 60-day prior notice provision gratuitous, and its assertion that such notice is nonetheless effective is without support in the statute, legislative history, or common practice. Lastly, there are over-riding public

U.S.C. § 11049(2)) that exceeds the applicable threshold quantities. 40 C.F.R. § 372.30 (1996). The chemical release information is compiled by EPA into the Toxic Release Inventory or the TRI.

³ *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995).

policy reasons behind Congress' affording EPA the authority to enforce violations of "any requirement" of EPCRA sections 312 and 313 and its failure to provide the same power to citizen groups. Under the Seventh Circuit's reading of section 326, citizen group lawyers would be given a perverse incentive to pursue EPCRA citizen suits to the detriment of the intent of the statute, which is to ensure that toxic chemical release data are collected and released to EPA, the applicable state and local entities, and the public for emergency planning and response purposes.

ARGUMENT

I. THE SEVENTH CIRCUIT'S READING OF EPCRA SECTION 326 IS CONTRARY TO ITS PLAIN MEANING AND THE RELEVANT LEGISLATIVE HISTORY

A. Like Other Citizen Suit Provisions, EPCRA's Citizen Suit Provisions Are Generally Cast in the Present Tense

The Seventh Circuit asserts that the EPCRA provisions are not "cast in the present tense" and it places great weight on this point. *Citizens for a Better Environment v. The Steel Company*, 90 F.3d 1237, 1244 (7th Cir. 1996) (reproduced at Pet. App. 1A-15A). The Seventh Circuit concludes that the statutory language permitting citizens to sue for failure to "complete and submit" the requisite forms under sections 312 and 313 can indicate either a failure in the past or present. It then goes on to look at the EPCRA citizen suit provision as a whole, and determines that use of the word "occurred" in the section 326(b) venue provision is evidence that Congress intended that an EPCRA citizen suit could reach historical violations. *The Steel Company*, 90 F.3d at 1244, Pet. App. at

A13. Strangely, the Seventh Circuit accords no weight to the use of the present tense in the section 326(d) notice provision, *i.e.*, notice must be given to the "State in which the alleged violation occurs." 42 U.S.C. § 11046(d). This Court, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59 (1987), cited the exact same notice provision language under section 505(b) of the Clean Water Act as an example of the forward-looking nature of that citizen suit provision. While the past tense is used in the venue section of EPCRA, this is not surprising since the citizen suit provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Solid Waste Disposal Act ("SWDA"), and the Toxic Substances Control Act ("TSCA") each incorporate the same venue provision.⁴ Courts interpreting the scope of CERCLA, SWDA, and TSCA citizen suits have concluded that jurisdiction exists only for ongoing violations.⁵

⁴ CERCLA § 310(b)(1), 42 U.S.C. § 9659(b)(1); SWDA § 7002(a), 42 U.S.C. § 6972(a); TSCA § 20(a), 15 U.S.C. § 2619(a).

⁵ See, *e.g.*, *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193 (6th Cir. 1995) (CERCLA citizen suit requires allegations of continuous or intermittent violations); *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 420-422 (M.D. Pa. 1989) (same); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1315 (2d Cir. 1993) (same for RCRA); *Moreco Energy, Inc. v. Penberthy-Houdaille*, 682 F. Supp. 931, 932 (N.D. Ill. 1987) (same for TSCA).

B. The EPCRA Citizen Suit Venue Provision Mirrors the CERCLA Language that Was Enacted as Part of the Same Legislation

The CERCLA citizen suit provision was enacted as part of the same legislation as EPCRA — the Superfund Amendments and Reauthorization Act of 1986 ("SARA" or "1986 Superfund Amendments").⁶ SARA used virtually the same venue language that the Seventh Circuit relied so heavily on, *i.e.*, "[a]ny action under . . . this section shall be brought in the district court for the district in which the alleged violation occurred," for both the CERCLA and the EPCRA citizen suit provisions. CERCLA § 310(b), 42 U.S.C. § 9659(b) and EPCRA § 326(b), 42 U.S.C. § 11046(b). This Court has recognized that it is a common canon of statutory construction that "language used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Associates*, 508 U.S. 248, 260 (1993).

Although the legislative history of the EPCRA citizen suit provision is sparse, the legislative history of the 1986 Superfund Amendments, of which EPCRA was a part, includes considerable discussion on the citizen suit provision that was added to CERCLA. In the Senate Committee on Environment and Public Works Report on S. 51, the Superfund Improvement Act of 1985, the Committee stated that:

A citizen suit provision has been a standard feature of each of the major environmental laws since the 1970's.

⁶ EPCRA was enacted as Title III of the 1986 Superfund Amendments.

The reported bill adds such a provision to the Superfund law. Under this new authority, modeled on the citizen suit provisions of the Clean Air, Clean Water and Solid Waste Disposal Acts, individuals may bring actions in Federal court against private parties . . .

S. Rep. No. 99-11, at 62 (1985).⁷ Thus, since the other citizen suit provisions have been held by this Court and others not to authorize citizen suits for wholly past violations (*see Gwaltney*, 484 U.S. at 56-63 and note 5 *supra*), and Congress modeled the CERCLA citizen suit provisions on those other statutes, there is no reason to believe Congress intended CERCLA to authorize citizen suits for wholly past violations, and courts have concurred, (*see, e.g., Coalition for Health Concern*, 60 F.3d at 1193; *Lutz*, 718 F. Supp. At 420-422), despite the fact that the CERCLA venue provision uses the past tense ("occurred").

⁷ Similar statements were made during the floor debate on the House of Representatives' bill H.R. 2817, the Superfund Amendments of 1985, and the relevant House Committee Reports on the legislation. *See, e.g.*, 131 Cong. Rec. H11,087 (daily ed. December 5, 1985) (statement of Rep. Glickman providing the House Judiciary Committee's Explanation of Purpose and Intent of section 113 of H.R. 2817 (noting the similarity between certain CERCLA citizen suit provisions with those of SWDA, TSCA, the Clean Air Act, and the Safe Drinking Water Act)); H. Rep. No. 99-253(III), at 33-34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3056-3057; and H. Rep. No. 99-253(V), at 83, *reprinted in* 1986 U.S.C.C.A.N. 3124, 3206 (in explaining CERCLA's citizen suit provisions, references made to similar provisions in the Clean Water Act).

Given that the EPCRA citizen suit provision was enacted as part of the same legislation as the CERCLA citizen suit provision, it seems unlikely that Congress would have intended the venue provision in EPCRA to mean something different from the venue provision in CERCLA. It also seems unlikely that Congress intended to depart from precedent in other environmental statutes and in CERCLA, to allow EPCRA citizen suits to seek civil penalties for wholly past violations, without even some cursory discussion in the final Joint House-Senate Conference Report accompanying the final version of the 1986 Superfund Amendments.⁸

C. The Seventh Circuit's Interpretation Distorts the Statute's Plain Meaning and Treads on EPA's Enforcement Authority

The phrase "failure to . . . complete and submit" the applicable forms "under" sections 312 and 313 should also be given its plain meaning. The Seventh Circuit makes the assumption that "under" means "in accordance with the requirements of" those sections. *The Steel Company*, 90 F.3d at 1243, Pet. App. at A11. While on its face this broad interpretation of the term may not seem unreasonable, in practice it expands citizen suit authority into enforcement areas that Congress specifically reserved to EPA. Under EPCRA section 325(c)(1), EPA is authorized to seek civil or administrative penalties from any person "who violates any requirement of" EPCRA sections 312 and 313. 42 U.S.C. § 11045(c)(1). If Congress had intended to grant citizen groups the same expansive enforcement

⁸ See H.R. Conf. Rep. No. 99-962, at 309-310 (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3402-03.

authority as EPA, it would have said so. As set out in EPA's EPCRA penalty policies, there is a laundry list of potential violations of sections 312 and 313, including numerous potential data quality errors such as failing to identify all appropriate categories of chemical use.⁹ Many of these data quality errors would seem to fall within the Seventh Circuit's interpretation that reports need to be submitted "in accordance with the requirements of" sections 312 and 313. *The Steel Company*, 90 F.3d at 1243, Pet. App. at A11. But, as noted by the Sixth Circuit in *United Musical*, "Congress limited citizen suits by emphasizing that it is the failure to submit the requisite forms that gives rise to a citizen action. Congress did not authorize citizen suits for other violations of § 11023." *United Musical*, 61 F.3d at 475.

II. THE SEVENTH CIRCUIT'S CONCLUSION THAT THE 60-DAY NOTICE REQUIREMENT IS NOT INCONSISTENT WITH ALLOWING SUITS FOR HISTORICAL VIOLATIONS TO GO FORWARD IS UNFOUNDED

Under EPCRA section 326(d), no citizen enforcement action may be brought until 60 days after notice of the violation has been provided to the alleged violator, EPA, and the state. The Seventh Circuit

⁹ See EPA's Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990), August 10, 1992, 23 ELR 35,523 ("EPCRA § 313 Penalty Policy"). See also Final Penalty Policy for EPCRA Sections 302, 303, 304, 311, and 312 and for CERCLA Section 103, June 13, 1990. 20 ELR 35,261. ("EPCRA § 312 Penalty Policy").

claims that allowing citizens to sue after overdue EPCRA filings have already been made does not "render the notice provision gratuitous." *The Steel Company*, 90 F.3d at 1244, Pet. App. at A13. The Seventh Circuit rationalizes its position by arguing that the 60-day notice provided to the alleged violator will still (i) give the alleged violator a chance to correct the citizen's information if he or she is mistaken about a violation, (ii) limit the alleged violator's exposure for additional penalties because "each day of an EPCRA violation is a separate violation," and (iii) conserve resources by giving violators a chance to enter settlement discussions with the citizens or EPA. *The Steel Company*, 90 F.3d at 1244, Pet. App. at A14. The Seventh Circuit's analysis is perplexing because these assumptions have no basis in the statute, the relevant legislative history, or common practice.

**A. The Seventh Circuit's Decision
Neutralizes the Intent of Providing a
60-Day Notice**

One of the primary functions of the 60-day notice provision is to allow EPA to initiate an enforcement action. The statute provides that "no [citizen] action may be commenced" where EPA has commenced and is "diligently pursuing an administrative order or civil action" to enforce an applicable requirement. EPCRA § 326(e), 42 U.S.C. § 11046(e). This limitation is a standard component of the citizen suit provisions of the major environmental laws, and, as this Court noted in *Gwaltney*, it suggests that the citizen suit is "meant to supplement rather than supplant governmental action." *Gwaltney*, 484 U.S. at 60. Further, this very point was recognized in the legislative history of the CERCLA citizen suit provision which was enacted with the EPCRA

provisions as part of the 1986 Superfund Amendments.¹⁰

In *Gwaltney*, this Court concluded, that:

It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.

Id. Rather than paying appropriate deference to precedent, the Seventh Circuit contends that Congress' amendment of the Clean Air Act undercuts this Court's determination in *Gwaltney* that Congress intended the 60-day notice provision to allow an alleged violator to come into compliance. *The Steel Company*, 90 F.3d at 1244, Pet. App. at A13. First, the 1990 Clean Air Act Amendments purport to grant district courts jurisdiction only for a subset of past violations, *i.e.*, past "repeated" violations.¹¹ Second, the Seventh

¹⁰ In the debate on H.R. 2817, the Superfund Amendments of 1985, Congressman Glickman provided the House Judiciary Committee's summary of the enforcement provisions of the bill. The summary provided that: "[t]he basic concept is that the purpose of citizen suits is to augment, not duplicate, government enforcement efforts. Consequently, instances where EPA or a state is involved in good faith negotiations will be protected from the drain and disruption that might otherwise be created by citizen suits." 131 Cong. Rec. H11,087 (daily ed. December 5, 1985) (Statement of Rep. Glickman providing the House Judiciary Committee's Explanation of Purpose and Intent of section 113 of H.R. 2817).

¹¹ The scope of this jurisdiction appears to be limited to very narrow circumstances in order to satisfy Article III

Circuit loses sight of the fact that the intent of EPCRA is to make sure that chemical release data is reported to the EPA and the state emergency response commission so that it may be used in developing emergency response plans and made publicly available so that potentially affected citizens may be aware of the possible risks from chemical releases in their community. H.R. Conf. Rep. 99-962, at 218 (1986), *reprinted in* 1986 U.S.C.A.N.N. 3276, 3374. If EPCRA citizen suits may only go forward for "ongoing" violations, an alleged violator certainly has plenty of incentive to file its forms as quickly as possible, *i.e.*, before the 60-day notice period expires, in order to avoid a citizen suit. This reading of the statute comports with EPCRA's intent of making the chemical release data available to EPA and the public. The Seventh Circuit's interpretation, however, would take away most, if not all, of the motivation for speedy compliance with the EPCRA reporting requirements.¹²

standing requirements. Moreover, as pointed out by the Sixth Circuit in *United Musical*, this argument is "unpersuasive since one can argue with at least equal force that by amending the Clean Air Act, but failing also to amend EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time the suit is filed." *United Musical*, 61 F.3d at 477.

¹² If a violator is going to be sued anyway, it does not really matter whether it complies with EPCRA reporting requirements within the 60-day notice period or waits until after the suit is filed. The alleged violator will still incur legal fees to defend itself, and more importantly the filing of a new or revised report could potentially be used by the citizen plaintiff as an admission that the report was legally required to have been filed previously. Conversely, if the company is uncertain whether a report was required to be

B. The Seventh Circuit's Conclusion that the 60-Day Notice Provision Is Not Rendered Gratuitous Is Contrary to Common Practice

The 60-day notice period may allow an alleged violator to point out "mistakes" by the citizen group, but this is really a misnomer because EPCRA section 326 only authorizes citizen suits for failure to "complete and submit" inventory forms and reports and either the forms and reports were filed or they were not.¹³ The Seventh Circuit also assumes that a violator can "limit its exposure" by filing late reports earlier during the 60-day period. But EPCRA does not specifically state that failure to file a report on time is a continuous violation from the date the report is due. EPA, in its EPCRA § 313 Penalty Policy, generally treats the failure to file a Form R report as a one-time violation in instances where the report is over a year late.¹⁴ As a result, EPA would typically assess only a

filed, a properly interpreted 60-day notice requirement creates an incentive for the company to err on the side of over-reporting, furthering the congressional goal of greater access to information.

¹³ As noted in Section I.C of this brief, the Seventh Circuit's decision appears to broadly interpret the scope of violations for which EPCRA citizen suits may be filed. By "mistakes" the Seventh Circuit may have also meant data quality errors, erroneous estimates of the volume of releases to be reported, etc., that should rightly be left to EPA's expertise and enforcement discretion. *See* Section III.B *infra*.

¹⁴ *See* EPCRA § 313 Penalty Policy, *supra* note 9. For reports that are less than a year late, EPA usually assigns a

maximum penalty of \$25,000 for a report that has missed the filing deadline by a year or more.¹⁵ Moreover, the Ninth Circuit has held that failure to submit a required notice under the Clean Air Act prior to commencement of an asbestos removal did not constitute a "continuous" violation, but only a single "day of violation," which occurred on the day before the renovation was commenced. *U.S. v. Trident Seafoods Corporation*, 60 F.3d 556 (9th Cir. 1995). Neither the statute nor the applicable EPA regulations support the Seventh Circuit's assumption that "continuous" penalties may be assessed for each subsequent day from the initial failure to file on the specified due date.

The Seventh Circuit's assertion that resources are conserved by fostering the opportunity for settlement during the 60-day period misses the mark in two ways. First, it is not clear that the alleged violator would have much of an incentive to settle within the 60-day period, since settlement with the citizen group would still leave the company vulnerable to an EPA enforcement action. More importantly, as noted above, the intent of EPCRA is to promote submittal of the reports to make the information available to EPA and the public, not to promote settlement on

pro rata share (on a per day basis) of the penalty up to a maximum of \$25,000.

¹⁵ EPA provides similar discretion in its EPCRA § 312 Penalty Policy to assess one penalty for a failure to file a timely inventory form. Inventory forms filed after 30 days from the reporting deadline are viewed as warranting a "level 1" penalty which may result in a maximum amount of \$25,000 per violation. EPCRA § 312 Penalty Policy, 20 ELR at 35264-66.

unspecified grounds before a citizen suit is even filed. Nowhere in the statute or the legislative history is this peculiar type of "incentive" even mentioned. In contrast, in the context of EPA enforcement, settlement negotiations with the government are encouraged through the "diligent prosecution" bar to citizen suits.¹⁶

III. THERE ARE OVER-RIDING PUBLIC POLICY REASONS SUPPORTING CONGRESS' DECISION TO GIVE EPA BROAD EPCRA ENFORCEMENT AUTHORITY AND NOT AFFORD THE SAME AUTHORITY TO CITIZENS

A. The Intent of EPCRA Citizen Suits Is to Ensure Chemical Release Data Are Reported, Not to Provide a Bounty for the Lawyers Representing Citizen Groups

The Seventh Circuit's interpretation of section 326 to authorize EPCRA citizen suits for wholly past, corrected violations largely rests on the premise that to read it any other way would "render the citizen enforcement provision virtually meaningless." *The Steel Company*, 90 F.2d at 1244, Pet. App. at A14. This is not the case. As the Sixth Circuit explained, if a company completes and files the requisite reports before the 60-day notice period expires, the mere

¹⁶ In discussing the CERCLA citizen suit provision, the House Judiciary Committee stated that the diligent prosecution bar is "also necessary to avoid the confusion or termination of settlement negotiations because EPA, a State, or potentially responsible parties face citizen suit litigation relative to the matters under negotiation." 131 Cong. Rec. H11,087, *supra* note 10.

notice of a citizen suit will have accomplished EPCRA's statutory goal. *United Musical*, 61 F.3d at 477. (Of course, even a facility that files the required reports during the 60-day notice period will still be vulnerable to a potential EPA enforcement action for the late filing. It is then a decision for EPA to make on whether other exigent circumstances weigh against assessing a penalty.)¹⁷

The Seventh Circuit posits that if citizens cannot seek recovery for past violations, then they would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing chemical release data. *The Steel Company*, 90 F.3d at 1244, Pet. App. at A14. But even if they were permitted to sue for wholly past violations, citizen groups still would not have any financial incentive for bringing such suits. To the contrary, they are prohibited from receiving any direct compensation from a suit.¹⁸ Their "incentive" is the accomplishment

¹⁷ EPA has not been reluctant to bring enforcement actions against late filers and other violators of EPCRA's provisions. For example, in 1994, EPA issued 242 EPCRA administrative penalty orders and assessed over \$8.2 million in penalties. EPA Enforcement and Compliance Assurance Accomplishments Report, FY 1994, EPA 300-R-95-004, May 1995, p. 4-5. In 1995, EPA closed 202 civil and administrative EPCRA cases and assessed over \$4.4 million in EPCRA civil and administrative penalties and secured over \$8.7 million in equivalent value in supplemental environmental projects. EPA Enforcement and Compliance Assurance Accomplishments Report, FY 1995, EPA 300-R-96-006, July 1996, p. 3-3 to 3-4.

¹⁸ To the extent any civil penalties would be extracted in a settlement or court decision, these are required to go to

of encouraging and assuring compliance, a goal that is just as well (and much more quickly) realized if the violator promptly corrects the problem after receiving the 60-day notice. The injury the citizens face is not having access to the data that EPCRA requires to be reported. Allowing citizen suits for past failures to report violations that have been corrected does not advance this cause of greater access to information at all. Permitting a citizen suit to go forward after a violation has been corrected basically serves only one purpose -- to reward the citizen group's lawyers with attorney fees and other expenses. There is absolutely nothing in the statute or legislative history that discusses creating incentives for citizen group lawyers to pursue past violators of EPCRA's reporting requirements.¹⁹

the U.S. Treasury. EPCRA §§ 325(c) and 326(c), 42 U.S.C. §§ 11045(c) and 11046(c).

¹⁹ It also is worth noting that EPCRA citizen suits can be filed with relative ease. All the EPCRA filings are available publicly. Data from the section 313 Form R reports are available on the National Library of Medicine's TOXNET System and EPA's Internet ENVIROFACTS database. Hard copies of the section 312 inventory forms and section 313 Form R reports are available from EPA through the Freedom of Information Act (5 U.S.C. § 552 *et seq.*). An enterprising citizen group lawyer merely needs to access the ENVIROFACTS database, key in the name of the relevant facility, and almost instantly information on whether the facility has filed its Form R reports is available.

B. Congress Intended that EPA, Not Citizen Groups, Make the Difficult Determinations on Whether EPCRA Reports Comply with the Requirements and Whether Punishment Is Warranted

Congress authorized EPA to bring an enforcement action against any person "who violates any requirement" of EPCRA, while it carefully limits citizens to suing for "failure" to "complete and submit" four types of reports. EPCRA § 326(a), 42 U.S.C. § 11046(a). There are strong policy reasons Congress would leave the bulk of EPCRA enforcement to EPA. EPA is in a much better position than a private citizen to determine whether the rules apply, whether a report is accurate, and when a transgression of the reporting requirements merits enforcement or when exigent circumstances or a good-faith failure to comply should be forgiven.

EPCRA is a complex statute with very technical definitions. Submittal of accurate Form R reports consistent with the section 313 statutory and regulatory specifications is often not a black and white issue. In many cases, the Form R report is the culmination of several time-consuming and deliberative determinations on whether a certain chemical mixture is subject to reporting or whether a particular chemical by-product of a manufacturing process qualifies as being "otherwise used" on-site, and thus potentially subject to reporting for releases above EPCRA's threshold quantities. Determinations of whether threshold quantities of toxic chemical releases are reached involve determining initially whether the toxic chemical qualifies as being "manufactured, processed, or otherwise used." EPCRA § 313(a), 42 U.S.C. § 11023(a). Each of these terms is further defined in 40 C.F.R. § 372.3 (1996). EPCRA also has a complex scheme for determining whether use of

chemical mixtures triggers the threshold reporting requirements. See 40 C.F.R. §§ 370.28 and 372.38 (1996). The Form R report must include estimates of releases of each covered chemical, even though there may be little or no measurement data to support those estimates.

An example of an area where *amici's* member companies must make technical interpretations is what constitutes a "waste stream" subject to Form R reporting. The Pollution Prevention Act of 1990 (PPA), 42 U.S.C. §§ 13101-09, added new reporting requirements for on-site process streams that are waste streams. Listed chemicals in the PPA waste streams, which include recycled streams and treated discharges, must be reported on Form Rs. EPA is in the process of developing a rule to define a "waste stream" and related concepts, but to date a rule has not been issued.²⁰ Nevertheless, companies must still make this determination. For example, a stream containing one or more reportable chemicals that is sent to a boiler or industrial furnace where it is used as a fuel would not appear to be a PPA waste stream if it displaces an available conventional fuel. But what constitutes an acceptable conventional fuel substitution? To date, EPA has not answered this question. Pulp mills generate spent pulping liquor as a residual of the wood pulping process, and generally these materials are recycled for chemical and energy recovery (burned as a fuel). In order to meet EPCRA's requirements, a mill may need to make its own conclusions on whether spent pulping liquor qualifies as a PPA waste stream that may need to be reported on the Form Rs.

Another complex area of EPCRA interpretation is what qualifies as a reportable "chemical mixture."

²⁰ The term "waste stream" is not defined by the PPA.

Frequently, the composition of mixtures may not be readily apparent, and a facility must determine whether the applicable thresholds under section 312 are met. Section 312 inventory form reporting is required for "hazardous chemicals" for which the maximum amount on-site at any one time exceeds specified quantities. Methanol is a hazardous chemical because of its ignitability. It is common practice for pulp and paper mills to have methanol present on-site as a trace contaminant of mixtures in certain process and waste streams. No reporting is required for a mixture that contains chemicals that would be considered "hazardous chemicals" if stored in their pure form, unless the concentration of the chemical in the mixture is more than 1 percent by weight (or more than 0.1 percent, if a carcinogen). 40 C.F.R. § 370.28 (1996). To prepare a correct inventory under section 312, the mill must generally assess all the chemicals contained in mixtures, know their concentration and whether or not they are considered carcinogens, and calculate how much of the chemical is included as a component of the mixture.²¹ There are often situations where the particular chemical mixture (or its components) may be required to be included in an EPCRA section 312 inventory form, but, depending on the characteristics of the mixture, the methanol contained in the mixture may not need to be reported separately on the section 312 report, *i.e.*, the methanol is less than the thresholds in 40 C.F.R. § 370.28 (1996). Difficult

²¹ As an alternative, EPA allows reporting on the entire mixture itself on the section 312 inventory form. 40 C.F.R. § 370.28(a)(2) (1996). However, for section 313 reporting requirements, the amount of a specific toxic chemical in a mixture that is released must be aggregated with other releases of the same chemical at the facility to determine if the reporting threshold is exceeded for that chemical. 40 C.F.R. § 372.30 (1996).

judgments often must be made before the EPCRA forms are filled out, and Congress thus rightly put the onus on EPA to enforce all EPCRA requirements and, where necessary, make the decision on whether a company is culpable for violating the Act.²²

It is appropriate for EPA, as the relevant government authority and the technical expert, to be making the difficult judgments about how the rules apply and whether a previously corrected error still warrants punitive action. For example, EPA has recognized that:

Generally, an EPA enforcement action may not be taken regarding changes to [Form R] reports that reflect improved information or improved procedures

²² The Seventh Circuit makes the assumption that inventory forms and Form R Reports can be thrown together with "minimal effort." *The Steel Company*, 90 F.3d at 1244, Pet. App. at A14. Again this assumption has little basis in practice. EPA has estimated that, in the first year alone, it takes approximately 50.5 hours of staff time to become familiar with the EPCRA rule requirements and determine compliance. Another 74 hours per report is needed to perform Form R calculations and complete the report, and maintain the relevant records. 61 Fed. Reg. 33,588, 33,617 (1996) (proposed rule to add seven new categories of facilities to the EPCRA reporting requirements). Since EPA requires a separate report for each chemical released above the applicable thresholds, many facilities are required to prepare multiple reports. While there is undoubtedly some time-saving economies of scale in preparing multiple reports, these are arduous reporting requirements that require more than a "minimal effort."

that were not available when the facility was completing its initial report.

56 Fed. Reg. 48,795, 48,798 (1991). EPA may also determine when only a Notice of Noncompliance is necessary or when an administrative or civil complaint should be filed. EPA's August 10, 1992 EPCRA § 313 Penalty Policy sets out a list of circumstances where inaccurately completed Form R reports would not automatically trigger a penalty, but only initially warrant a Notice of Noncompliance. EPCRA § 313 Penalty Policy 23 ELR at 35,523.²³ To put private citizens in EPA's role would not be filling the gaps in EPA enforcement, but would be "potentially intrusive." *Gwaltney*, 484 U.S. at 61.

CONCLUSION

Congress did accord a role for citizens in enforcing certain EPCRA requirements, and that role is a limited one. Nowhere in the statute or the legislative history are citizens granted the right to sue for wholly past violations that have been remedied. The Seventh Circuit's conclusion that citizen suits for wholly past violations do not disrupt EPCRA's enforcement balance between EPA and citizens does not reflect the practical realities of EPCRA compliance and enforcement. Moreover, there are over-riding

²³ Failure to respond to a Notice of Noncompliance would, under the EPCRA § 313 Penalty Policy, result in a penalty assessment. EPCRA § 313 Penalty Policy, 23 ELR at 35,524.

policy reasons for rejecting the Seventh Circuit's interpretation. For these reasons, the Seventh Circuit's decision should be reversed.

Respectfully submitted,

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Supreme Court, U. S.

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No. 96-643

**IN THE
Supreme Court of the United States**

October Term, 1996

**THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
*Petitioner,***

v.

**CITIZENS FOR A BETTER ENVIRONMENT,
*Respondent.***

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

**BRIEF AMICUS CURIAE
OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED FOR REVIEW

Whether, in enacting the citizen suit provision of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, Congress intended to authorize citizens to seek penalties for violations that were cured before the citizen suit was filed, thereby granting EPCRA citizen suit plaintiffs greater enforcement authority than that granted to other citizen suit plaintiffs under other federal environmental statutes.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, The Steel Company. Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation matters affecting the public interest. PLF has over 20,000 supporters nationwide. PLF policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only when PLF's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

PLF has a long-standing interest in environmental issues and has participated in numerous cases involving statutory interpretation of federal environmental laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in *Bennett v. Spear*, Supreme Court No. 95-813; *Douglas County, Oregon v. Babbitt*, Supreme Court No. 95-371; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, __ U.S. __, 115 S. Ct. 2407 (1995); and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).

The Seventh Circuit ruling in this case, authorizing citizen enforcement of wholly past reporting violations under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11001, et seq., conflicts with this Court's unanimous decision in *Gwaltney of Smithfield, Ltd. v.*

Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987), and is contrary to the intent of Congress.

At issue in this case is not only the plain meaning of the citizen suit provision of EPCRA, but also the policy interests behind such provisions. Whereas this Court held in *Gwaltney* that citizen suits (with forward-looking preenforcement notice requirements) are authorized to support, but not supplant, government enforcement of environmental laws, the Seventh Circuit reasoned the main purpose of such citizen suits is to reward citizen enforcers.

PLF's public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The question presented in this case is whether Congress intended to authorize citizens, under EPCRA, to seek penalties for violations that were cured before the citizen suit was filed. The facts that give rise to this question follow.

The Steel Company (Company) is a minority-owned steel manufacturer and pickler in Chicago, Illinois. The Company started in 1971 and employs about 55 people. The Company is subject to EPCRA which requires, among other things, the annual submission of chemical inventory and release forms to federal, state, and local entities pursuant to Sections 312 and 313. On March 16, 1995, Citizens for a Better Environment (Citizens), an environmental citizen group, sent an EPCRA 60-day notice of intent to sue to the United States Environmental Protection Agency (EPA), the state, and the Company alleging the Company had never filed the requisite forms. Before the 60-day notice period had run, the Company filed the forms with the EPA. EPA chose not to pursue any enforcement action but,

notwithstanding the filing, Citizens filed suit in the Northern District Court of Illinois seeking, among other things, civil penalties in the amount of \$537,500,000 against the Company.

A few days before Citizens filed suit, the Sixth Circuit held, on facts indistinguishable from this case, that private citizens could not sue for past EPCRA violations. *Atlantic States Legal Foundation v. United Musical, Inc.*, 61 F.3d 473 (6th Cir. 1995). Based on the Sixth Circuit's opinion, the Company's motion to dismiss was granted. Citizens appealed, and on July 23, 1996, the Seventh Circuit reversed.

Although the Seventh Circuit noted the District Court's reliance on *United Musical* was not misplaced, and that *United Musical* relied on *Gwaltney*, the court nevertheless rejected the Sixth Circuit holding. In *Gwaltney*, this Court considered the 60-day notice provision for citizen suits under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and unanimously held the purpose of the provision is to allow the alleged violator to come into compliance, thus making a citizen suit unnecessary. According to this Court, the power to sue for penalties based on past violations rested solely with the government. In this case, however, the Seventh Circuit reasoned it is more important to reward citizen groups financially for their enforcement efforts.

SUMMARY OF THE ARGUMENT

Congress struck a balance between citizen enforcement under environmental statutes and burdening the federal courts with excessive citizens suits. This goal is achieved through the 60-day notice provision which allows the alleged violator to come into compliance and the government to enforce the law so as to obviate the need for a citizen suit. The lower court decision in this case, however, upsets that balance. It nullifies EPCRA's 60-day notice provision and undercuts the government's enforcement discretion by authorizing citizen

suits after the alleged violator has complied and the government chooses not to seek civil penalties.

The lower court decision misinterprets the language of EPCRA and contradicts this Court's unanimous ruling in *Gwaltney*. In that case, this Court held if citizen suits may target wholly past violations, the notice requirement becomes gratuitous. This Court also held that the citizen suit is meant to supplement rather than supplant government action. Contrary to the intent of Congress, the lower court decision encourages excessive lawsuits. In the Seventh Circuit, virtually anyone may bring a retroactive citizen suit under EPCRA, asserting staggering civil liability--like the \$573,500,000 claim filed against the Steel Company in this case--to force a lucrative monetary settlement with the plaintiff. These after-the-fact lawsuits provide no environmental benefit but enrich the plaintiff and encourage opportunistic lawsuits. This form of legalized extortion could not have been the intent of Congress.

Contrary to the Seventh Circuit in this case, the Sixth Circuit in *United Musical* concluded the plain language and structure of EPCRA leads to the conclusion that citizen plaintiffs may not bring actions that seek civil penalties for purely historic violations. The Sixth Circuit is in accord with *Gwaltney* and has the better analysis. Contrasting the Sixth and Seventh Circuit analyses is instructive. This Court should uphold the policy rationale it expressed in *Gwaltney* for citizen suits reverse the ruling below in this case.

ARGUMENT

I

CONGRESS STRUCK A BALANCE BETWEEN CITIZEN ENFORCEMENT AND BURDENING THE FEDERAL COURTS

In crafting the citizen suit provision of environmental laws, Congress sought to "strike a balance between

encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." See *Hallstrom v. Tillamook County*, 493 U.S. at 29 (analyzing the legislative history of the citizen suit provision of the Clean Air Amendments of 1970, which served as the precursor to analogous citizen suit provisions in other environmental laws, including the Clean Water Act, the Resource Conservation and Recovery Act, and the Emergency Planning and Community Right-to-Know Act). This Court stated in *Hallstrom*:

Requiring citizens to comply with the [60-day] notice and delay requirements serves this congressional goal in two ways. First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) ("The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action"). In many cases, an agency may be able to compel compliance through administrative action, thus eliminating the need for any access to the courts. ... Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney*, 484 U.S. at 60.

Hallstrom, 493 U.S. at 29.

The decision below, allowing citizen suits for purely past violations, frustrates this congressional policy to avoid unnecessary litigation and unsettles the balance Congress sought between encouraging citizen enforcement and avoiding

burdening the federal courts with excessive suits. The Seventh Circuit decision nullifies the purpose of the 60-day notice provision and interferes with the government's enforcement discretion.

A. The Lower Court Decision Nullifies the 60-Day Notice Provision

In *Gwaltney*, this Court considered whether the citizen suit provision in the Clean Water Act (CWA), which is strikingly similar to the citizen suit provision in EPCRA, authorized citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction citing, among other things, the forward-looking language, and the purpose of the citizen suit provision.

This Court stated one of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense. *Gwaltney*, 484 U.S. at 59. By way of example, this Court cited the notice provision of the Clean Water Act that citizen-plaintiffs must give notice to the alleged violator, the administrator of the EPA, and the state in which the violation "occurs." *Id.* at 59. This Court's present tense interpretation of the word "occurs" stands in stark contrast to the interpretation given this same word in the notice provision of EPCRA by the Seventh Circuit. The Circuit Court minimized the present tense character of the term "occurs" by suggesting another term "is occurring," which was also found in the Clean Water Act, but not in EPCRA, categorically distinguished *Gwaltney* from this case. This hypertechnical parsing of the language of the statute, however, is contrary to a plain reading of the law. The Seventh Circuit's holding that the enforcement provisions of EPCRA, including the word "occurs," are not likewise cast in the present tense and, consequently, are not limited to a prospective orientation is wrong. *Citizens for a Better Environment v. Steel Company*, 90 F.3d 1237, 1244 (Th Cir. 1996) (*Citizens*).

The Seventh Circuit compounded its error in this case by flatly rejecting this Court's policy rationale for disallowing citizen suit actions for wholly past violations.

In *Gwaltney*, this Court reasoned retroactive citizen suits would render incomprehensible the CWA notice provision that requires citizens to give 60-day's notice of their intent to sue to the alleged violator as well as to the administrator of the EPA and the state. *Gwaltney*, 484 U.S. at 59. "If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary." *Id.* According to this Court, it follows logically that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a citizen suit." *Id.* at 60. In a unanimous opinion, this Court stated: "If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." *Id.*

EPCRA has the same notice requirement as the CWA. The Seventh Circuit ruling, that citizen suits under EPCRA may target wholly past violations, makes the requirement of notice to the alleged violator gratuitous.

B. The Lower Court Decision Undercuts the Government's Enforcement Discretion

Aside from making the notice requirement gratuitous, retroactive citizen suits would create a second and even more disturbing anomaly. This Court pointed out that the bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant government action. *Id.* "Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit." *Id.* To illustrate this danger, this Court posed a hypothetical.

Suppose the administrator of the EPA identified a violator and issued a compliance order. *Id.* "Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 60-61. "If citizens could file suit, months or years later, in order to seek the civil penalties the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61.

In the decision below, the Seventh Circuit acknowledged that the Administrator has discretion to determine the level of civil penalties, if any, assessed in a particular case. That determination may be based on various factors, including the seriousness of the violation, the violator's "attitude," and other factors. *Citizens*, 90 F.3d at 1241. However, the lower court has failed to realize the significance of this discretion.

The Environmental Protection Agency has determined it is sometimes in the public interest to forego penalties altogether. An early statement of EPA policy recognized that civil penalties may not be appropriate in the unusual situation where the violator is not negligent. Environmental Protection Agency Civil Penalty Policy (February 16, 1984) at 24. The purposes of deterrence and punishment are not fulfilled by making an innocent violator pay civil penalties or incur additional attorneys' fees.

Not all violations of EPCRA's reporting requirements are willful. The Seventh Circuit observed in this case that "[m]any industrial companies subject to the Act remained unaware of its existence long after it went into effect" in 1986. *Citizens*, 90 F.3d at 1238. Whether it serves the public interest in a particular case, such as this case, to pursue penalties should be left in the hands of the agency tasked with the responsibility to enforce the Act. That decision should not be left in the hands

of special interest plaintiffs who invariably seek to maximize penalties, as attested by Citizens' \$573,500,000 claim in this case, without regard for culpability or actual harm to the environment.

In *Gwaltney*, this Court concluded that an interpretation of the scope of the citizen suit provision of the Act, allowing citizen suits for past violations, would change the nature of the citizen's role from interstitial to potentially intrusive. *Id.* "We cannot agree that Congress intended such a result." *Id.*

This Court's policy rationale for limiting the scope of the citizen suit provision of the CWA applies equally to EPCRA. EPCRA contains a prohibition on citizen suits when the government acts; the notice provision of EPCRA contains forward-looking language; and, the legislative history does not suggest a contrary congressional intent.

The lower court rejected this Court's policy considerations based on an amendment to an act other than EPCRA. The Seventh Circuit held the reasoning of this Court is no longer as compelling as it was when *Gwaltney* was decided because, since then, Congress amended the Clean Air Act, to permit citizen enforcement actions for past violations, yet left the notice provision intact. *Citizens*, 90 F.3d at 1244. The Seventh Circuit apparently believes that when Congress amended the Clean Air Act to explicitly allow citizen suits for past violations any statute with a similar notice provision, like EPCRA, had been implicitly altered as well. Other environmental statutes that contain similar notice provisions, and which this Court has concluded authorize only prospective relief, include the Clean Water Act, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.* *Gwaltney*, 484 U.S. at 57. The implication that these acts have also been changed by amendment of the Clean Air Act is unreasonable. A more reasonable implication is that Congress consciously chose to maintain the rule of *Gwaltney* for the Clean Water Act

and EPCRA. All the amendment of the Clean Air Act shows is that Congress knows how explicitly to authorize citizen suits for wholly past violations, in particular situations, when it intends to do so. *See id.* Congress never explicitly authorized such citizen suits in EPCRA.

C. The Lower Court Decision Encourages Excessive Citizen Suits

In place of, and totally contrary to, the policy rationale applied by this Court in *Gwaltney*, the Seventh Circuit suggested a rationale that seeks foremost to reward citizen enforcers financially. The Seventh Circuit held EPCRA creates a structure that encourages private citizens to invest the resources necessary to uncover violations of the Act by allowing courts to award the costs of enforcement to substantially prevailing parties. *Citizens*, 90 F.3d at 1244. If citizen suits could be fully prevented, the court argues, by completing and submitting forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. *Id.* Put simply, the court stated, if citizens can't sue, they can't recover the costs of their efforts. *Id.* "Private enforcement of the reporting requirements would undoubtedly drop off." *Id.* at 1245.

This rationale overlooks the very real probability that, in cases involving "reporting requirements," the cost of determining who the violators are may be little more than the cost of a Freedom of Information Act request to the EPA. Most of the "reward" to the plaintiff from the citizen suit is likely to reflect the totally unnecessary costs of the litigation.

The Seventh Circuit also overlooks that EPCRA, like the CWA, contains a provision that bars citizen suits when the government chooses to enforce the Act. 42 U.S.C. § 11046(e). If the government exercises its enforcement discretion, citizens cannot bring a suit and recover their costs anyway. Therefore,

limiting citizen suits to prospective relief leaves citizens no worse off than if the government chooses to act, and the government has discretion to act in all cases. To achieve, in all cases, the ends suggested by the Seventh Circuit--to reward citizens for their enforcement efforts--EPCRA would have to be read to authorize a citizen suit every time a citizen sends a notice of intent to sue, even if the government pursues a discretionary enforcement action. Clearly, Congress did not intend such a result.

The Seventh Circuit laments that if citizen suits are not allowed for wholly past violations under EPCRA, citizen suits could only proceed when a violator receives notice of intent to sue and still fails to comply. *Citizens*, 90 F.3d at 1244. That is correct. To avoid unnecessary lawsuits, that is precisely what Congress intended.

Under Sections 312 and 313 of EPCRA, civil penalties can amount to \$25,000 per violation. Each day is a separate violation. *Citizens*, 90 F.3d at 1241. Nevertheless, as previously noted, the Seventh Circuit observed in this case, "[m]any industrial companies subject to the Act remained unaware of its existence long after it went into effect" in 1986. *Id.* at 1238. The EPA estimated that of the approximately 30,000 facilities required to submit Section 313 forms, over one-third had not. General Accounting Office, EPA's Toxic Release Inventory Is Useful but Can Be Improved, at 49 GAO/RCED 91-121 (June, 1991). Additionally, according to an EPA report sent to the Office of Management and Budget, specified annual reporting requirements under EPCRA Sections 311 and 312 potentially affect 866,285 facilities. 60 Fed. Reg. 35,201. For those facilities that are still unaware of EPCRA, the potential liability is immense. Indeed, Citizens allege the Company in this case was out of compliance for approximately eight years and is liable for penalties of \$537,500,000. Complaint at 23, 30.

The allure of tens of thousands of potential defendants with such huge potential liability is irresistible to opportunistic plaintiffs. Plaintiffs, such as Citizens in this case, can and do use the threat of a lawsuit to coerce lucrative settlements from alleged violators--settlements that benefit the plaintiffs. Citizens are quite proud of this fact and readily admit that those companies that don't settle with them will be "punished" with a lawsuit.

In the event that CBE is unable to settle the matter, it files court actions seeking penalties to be paid to the United States Treasury to *punish* non-complying companies and other companies from ignoring EPCRA.

Opening Brief for Plaintiff-Appellant, Citizens for a Better Environment, in the United States Court of Appeals for the Seventh Circuit at 9-10 (emphasis added).

Citizens have found a court-endorsed means of exploiting a lucrative new market in citizen suits. The threat of a lawsuit to "punish non-complying companies" with exorbitant penalties is a great incentive to "settlement" with plaintiffs, wherein the plaintiffs, and not the government, receive money from the defendant to ward off a lawsuit. Moreover, under the lower court decision, plaintiffs need not have even precipitated compliance of a delinquent business to use the threat of a lawsuit to extort money and operational concessions from the business. Plaintiffs need only become aware of a late filing of the requisite EPCRA forms, then sue.

The Seventh Circuit has forgotten, however, that the paramount objective of citizen suits is to encourage compliance and assist, not replace, government law enforcement. That is the theme pervading this Court's ruling in *Gwaltney*. However, the Seventh Circuit would convert that objective to a form of vigilante justice by encouraging citizen lawsuits that cannot further environmental protection (because the infraction has

already been cured) but serve only to burden the federal courts with excessive citizen suits, punish regulated parties, and reward citizen-plaintiffs. This disturbs the very balance Congress tried to achieve through the citizen suit in the first place.

II

EPCRA DOES NOT AUTHORIZE CITIZEN SUITS FOR PAST VIOLATIONS

Contrary to the Seventh Circuit in this case, in *United Musical* the Sixth Circuit held, "the plain language and structure of EPCRA lead us to conclude that citizen plaintiffs may not bring actions that seek civil penalties for purely historic violations." *United Musical*, 61 F.3d at 478. The Seventh Circuit in this case expressly rejected the Sixth Circuit analysis. *Citizens*, 90 F.3d at 1242 n.1. However, the Seventh Circuit ruling is not supported by the plain meaning of the Act, the legislative history, or the policy objectives of such citizen suits. The Sixth Circuit has the better analysis. Contrasting these differing opinions is instructive.

In *United Musical*, the Atlantic States Legal Foundation sent United Musical Instruments a notice of intent to sue for that company's failure to submit the chemical release reporting forms required by Section 313 of EPCRA. Within the 60-day notice period, the company submitted the forms. Yet, the foundation sued the company in federal District Court for the past violation. The District Court dismissed the case as time-barred. On appeal, the Sixth Circuit upheld the dismissal because EPCRA does not allow citizen suits for past violations that have been cured by the date the action commences. *United Musical*, 61 F.3d at 475.

To reach this conclusion, the court looked first at the language of the statute and found Congress could have phrased its requirements in language that looked to the past but it did not choose this readily available option. *Id.* at 477. Rather, the

court determined the most natural reading of the citizen suit provision of EPCRA weighs against allowing citizen suits for purely historical violations. *Id.* The court then looked at the legislative history of EPCRA and determined there is nothing indicating Congress intended to allow citizens to sue for past violations. *Id.*

Another decisive factor in the court's determination was this Court's discussion in the *Gwaltney* opinion concerning the role of citizen suits in the Clean Water Act. The court noted that EPCRA, like the Clean Water Act, prohibits citizen suits once EPA has commenced an enforcement action. In *Gwaltney*, this Court stated the bar on citizen suits when government enforcement action is under way suggests citizens suits are meant to supplement rather than supplant governmental action and that Congress could not have intended a contrary result. *Gwaltney*, 484 U.S. at 60.

But, contrary to the Sixth Circuit finding in *United Musical*, the Seventh Circuit found the citizen suit provision of EPCRA does look to the past. However, where the Sixth Circuit required explicit congressional language allowing citizen suits for historical violations, the Seventh Circuit was satisfied with something much less.

For example, the Seventh Circuit noted EPCRA authorizes citizens to sue "for failure to" comply with the statute. The court then maintained this ambiguous reference "can indicate a failure past or present." *Citizens*, 90 F.3d at 1243. The Seventh Circuit also noted that notice of intent to sue must be given to the EPA, the alleged violator, and "the State in which the alleged violation occurs." *Id.* at 1244. Although the term "occurs" in the notice provision clearly connotes something ongoing, the Seventh Circuit unabashedly maintained EPCRA contains no language to indicate that citizens must allege an ongoing violation. *Id.*

Aside from its strained reading of the statutory language, the Seventh Circuit cites nothing in the legislative history of EPCRA to justify its conclusion that EPCRA authorizes citizen suits for past violations. Rather, the court infers Congress intended to allow such suits when it amended the Clean Air Act. *Citizens*, 90 F.3d at 1244.

In 1990, Congress amended the Clean Air Act to allow citizen enforcement actions for historical violations, but left the notice provision intact. According to the Seventh Circuit, the rationale behind *Gwaltney*--that allowing citizens to sue after violations ceased would defeat the purpose of the notice provision and undercut the EPA's enforcement discretion--becomes less compelling when considered in light of this amendment to the Clean Air Act. *Id.* But the Sixth Circuit had a response to that argument.

In *United Musical*, the court acknowledged this argument has a certain logic but determined it is unpersuasive since one can argue with equal force that by amending the Clean Air Act, but not amending EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time the suit is filed. *United Musical*, 61 F.3d at 477. In fact, the Sixth Circuit correctly concluded that in the absence of explicit congressional language mandating such a result--as in the amended Clean Air Act--the court must reject the argument. *Id.*

Finally, the Seventh Circuit considered the purpose of the citizen suit provision and concluded the provision must be interpreted to reward citizens for their enforcement efforts. *Citizens*, 90 F.3d at 1244. According to the lower court, allowing citizen suits for past violations would advance this purpose. *Id.* However, nothing in either the act or the legislative history suggests the purpose of the EPCRA citizen suit provision is to reward or otherwise finance opportunistic legal challenges. The Seventh Circuit's view of the purpose of citizen suits is contrary to good public policy and runs counter

to the view adopted by this Court in *Gwaltney* that citizen suit provisions, like the provision in this case, are intended to only supplement, but not replace, the enforcement efforts of the government.

CONCLUSION

The Seventh Circuit ruling is not supported by the plain meaning of the Act, the legislative history, or the policy objectives of such citizen suits. The lower court decision serves only to encourage citizen litigation for profit--a form of legalized extortion. That was never the intent of Congress. Rather, a plain reading of EPCRA and similar environmental statutes suggests the purpose of citizen suits is to assist, not replace, discretionary government enforcement. This Court should overturn the decision below.

DATED: April, 1997.

Respectfully submitted,

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BRIEF

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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1996

THE STEEL COMPANY, A/K/A CHICAGO STEEL AND
PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

**Brief Amici Curiae of American Iron & Steel Institute,
American Petroleum Institute, California Council for
Environmental and Economic Balance, Chamber of
Commerce of the United States, Edison Electric Institute,
Kitchen Cabinet Manufacturers Association,
Michigan Manufacturers Association and
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Michigan Manufacturers Association and
The Society of the Plastics Industries
In Support of the Petitioner**

This brief *amici curiae* of the American Iron & Steel Institute, *et al.*, is submitted in support of Petitioner The Steel Company. Like Petitioner, *amici* submit that the opinion of the United States Court of Appeals for the Seventh Circuit in *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) (reproduced at Pet. App. 1a-17a) is erroneous and should be reversed.

The court of appeals' decision concerns the reporting provisions of sections 312 and 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. §§ 11022 and 11023, and raises the question of whether a private enforcement action ("citizen suit") under section 326 of EPCRA, 42 U.S.C. § 11046, is authorized against a defendant who, as all in this case agree, filed the reports required under sections 312 and 313 *prior* to commencement of the underlying citizen suit by the Respondents, Citizens for a Better Environment, *et al.* ("CBE"). The Seventh Circuit's decision allows a federal court to hear an EPCRA citizen suit under section 326 even where the defendant completely cured the alleged violation -- failure to complete and file certain environmental reporting forms -- prior to the initiation of suit. That decision contravenes Congress's intent that the statutorily-required pre-suit notice under EPCRA (and similar environmental statutes) would allow alleged violators to cure such violations without the need for recourse to the courts. The Seventh Circuit's interpretation of EPCRA section 326 not only conflicts with the Sixth Circuit's decision in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1996), but also with this Court's decisions in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). The latter cases involved the citizen suit provisions of the Clean Water Act and Resource Conservation and Recovery Act, respectively. This Court's rulings in each case are clearly at odds with the Seventh Circuit's interpretation of the directly analogous provisions of section 326 of EPCRA.^{1/}

^{1/} On April 27, 1997 President Clinton announced that EPA will finalize expansion of EPCRA section 313 reporting to thousands of new facilities in seven additional industrial sectors, which will encompass many small businesses. *Daily Environmental Reporter* (BNA) (Apr. 23, 1997) at AA-1. EPA intends to extend EPCRA reporting requirements to other industrial categories in the future. The citizen suit provisions at is-

STATEMENT OF INTEREST OF AMICI

Pursuant to Rule 36 of the Rules of the Supreme Court, *amici* American Iron & Steel Institute, American Petroleum Institute, California Council for Environmental and Economic Balance, Chamber of Commerce of the United States, Edison Electric Institute, Kitchen Cabinet Manufacturers Association, Michigan Manufacturers Association and The Society of the Plastics Industries (collectively, "industry *amici*"), file this brief in support of Petitioner The Steel Company. *Amici*, representing a broad spectrum of industry in the United States, support Petitioner's position seeking reversal of the decision below on the grounds that citizen suits under EPCRA may not be brought to impose civil penalties for wholly past violations. This brief is submitted to supplement Petitioner's argument by providing additional perspective on the consequences of applying the decision below to the broader industrial community.^{2/}

Amicus American Iron & Steel Institute ("AISI") is a trade organization representing North American manufacturers, processors and other producers of iron and steel and related products. Virtually every domestic member of AISI is subject to regulation under EPCRA and parallel state laws. AISI's 50 member companies represent approximately 70% of steel production in the United States. AISI represents the views of its members before courts and regulatory agencies on issues of law and public policy that are of significant concern to them.

Amicus American Petroleum Institute ("API") is a trade association whose membership includes over 300 companies involved in all aspects of the petroleum industry, including exploration, production, transportation, refining and marketing. Many API members are regulated under EPCRA. API is

sue here will, accordingly, affect an increasing number of business entities, many outside the large manufacturing sectors.

^{2/} Letters confirming that the Petitioner and Respondents consent to the filing of this brief have been filed with the Clerk of the Court.

an advocate on important issues of public policy before courts, legislative bodies, regulatory agencies and other forums.

Amicus California Council for Environmental and Economic Balance ("CCEEB") is a private, non-profit coalition of organized labor and businesses in California. CCEEB was established in 1973 and has been an advocate before legislative and regulatory forums for solutions to achieve California's environmental and economic goals.

Amicus Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector and region. Ninety-six percent of the Chamber's members are businesses with less than 100 employees. The Chamber regularly advocates the interests of its members in court on environmental issues of national concern to the business community.

Amicus Edison Electric Institute ("EEI") is the association of investor-owned electric utilities in the United States and their industry associates worldwide. EEI's U.S. members serve 99% of all customers served by the investor-owned segment of the electric utility industry. They generate about 78% of all the electricity generated by electric utilities, and service 76% of all ultimate customers in the Nation. EEI members are regulated under EPCRA. EEI is a frequent advocate on behalf of its members' interests in connection with important issues of law and policy that arise before courts, legislative bodies and regulatory agencies.

Amicus Kitchen Cabinet Manufacturers Association ("KCMA") is a voluntary non-profit trade association founded in 1955. Currently, KCMA represents over 350 members who manufacture kitchen cabinets and bath vanities, countertops and other decorative laminate products, or supply goods and services to such manufacturers. Fifty-five percent

of KCMA members report annual sales under \$5 million and 75% report sales under \$10 million (annual industry sales are estimated at over \$5.5 billion). KCMA conducts research and educational programs, and represents its members' interests in important judicial, legislative and regulatory matters.

Amicus Michigan Manufacturers Association ("MMA") is a business association of private Michigan employers, studying matters of general interest to its members, promoting their interests and the interests of all Michigan employers and the general public in the proper administration of laws relating to its members, and otherwise promoting the general business and economic welfare of Michigan. MMA's more than four thousand members employ 90% of the industrial work force in Michigan -- over one million people. An important aspect of MMA's activities is representing its members as *amici curiae* in a broad range of matters before the courts.

Amicus The Society of the Plastics Industries, Inc. ("SPI"), is a trade association of nearly 2,000 members representing all segments of the plastics industry in the United States. SPI's business units and committees are composed of plastics processors, raw material suppliers, machinery manufacturers, moldmakers and other industry-related entities. Founded in 1937, SPI serves as the voice of the plastics industry before each level of government in matters of concern to SPI members.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Gwaltney*, this Court ruled that citizen suits may not be maintained for wholly past violations of the Clean Water Act ("CWA"). But the Seventh Circuit concluded that the language of EPCRA's citizen suit provision is distinguishable from the CWA and the reasoning underlying *Gwaltney* "is no longer as compelling as it was when *Gwaltney* was decided." 90 F.3d at 1244; *see also id.* at 1242. Industry *amici* disagree on both points. In ruling that EPCRA section 326 authorizes citizen suits for wholly past violations, the Seventh Circuit

suggested that EPCRA's citizen suit provision "does not point clearly to the present tense as its counterpart [CWA § 505, 33 U.S.C. § 1365] does in the Clean Water Act." *Id.* at 1243. Therefore, according to the court of appeals, section 326 of EPCRA is not limited to ongoing noncompliance. *Id.* The court reasoned that the mandatory pre-suit notice provision in section 326 was not intended to allow the would-be defendant to cure the alleged noncompliance and thus render a citizen suit unnecessary. If the converse were true it would, according to the Seventh Circuit, "render the citizen enforcement provision [of EPCRA] virtually meaningless" because "citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. Put simply, if citizens can't sue, they can't recover the costs of their efforts." *Id.* at 1244.

The Seventh Circuit's holding that federal courts may hear EPCRA citizen suits even though compliance has been achieved prior to and without the necessity of a suit is flawed in three principal respects. First, the decision erroneously considered extrinsic evidence in interpreting EPCRA's citizen suit provision. EPCRA clearly provides that wholly past violations are not actionable, thus rendering the use of extrinsic evidence both unnecessary and improper. Second, even if the Seventh Circuit had been correct in resorting to extrinsic aids to construe EPCRA's citizen suit provision, the court misapplied those aids and failed to recognize that in crafting EPCRA's citizen suit provision, Congress used the template that underlies essentially all environmental citizen suits, and which this Court has held does not authorize citizen suits for wholly past violations. Finally, assuming that EPCRA could nevertheless be construed to allow private suits for wholly past violations, such an interpretation would fail to satisfy the

"irreducible minimum" requirement for standing to sue under Article III of the Constitution.³⁷

ARGUMENT

I. CONSISTENT WITH THIS COURT'S RECOGNITION OF THE LIMITS CONGRESS INTENDED FOR ENVIRONMENTAL ENFORCEMENT BY CITIZENS, EPCRA'S PLAIN LANGUAGE MAKES CLEAR THAT FEDERAL COURTS LACK JURISDICTION OVER CITIZEN SUITS FOR WHOLLY PAST VIOLATIONS

A. EPCRA's Plain Language Dictates That Citizens May Not Sue For Wholly Past Violations

This is a straightforward statutory interpretation case. *Atlantic States v. United Musical Instruments*, 61 F.3d 473. That is because the plain language of section 326 of EPCRA authorizes citizen suits only "for failure to . . . [c]omplete and submit an inventory form under Section 11022(a) [EPCRA § 312(a)] [and] . . . a toxic chemical release form under Section 11023(a) [EPCRA § 313(a)]." Here, as of the date the underlying suit was filed, The Steel Company had "completed and submitted" all necessary forms. The Seventh Circuit, therefore, should have affirmed the district court's decision in favor of Petitioner, without resort to extrinsic aids. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Isbrandtsen Co., Inc. v. Johnson*, 343 U.S. 779 (1952) (court bound to give effect to expressed intent of legislature).

More specifically, section 326 of EPCRA provides that "any person" may commence a civil action on his own behalf against "[a]n owner or operator of a facility for failure to do

³⁷ Affirming the Seventh Circuit would expose thousands of small businesses to costly litigation and legal expense despite good-faith efforts to comply and prompt action to correct previous noncompliance.

any of the following,” including the failure to “complete and submit” the forms described in sections 312(a) and 313(a) of EPCRA. But here there is no allegation that Petitioner failed to “complete and submit” either of the required forms prior to commencement of CBE’s suit. Accordingly, the district court had correctly ruled in this case -- in accordance with this Court’s *Chevron* decision -- that under the plain language of the statute the court had no jurisdiction to hear CBE’s suit.

Nevertheless, to buttress its contrary interpretation, the Seventh Circuit noted that section 326 authorizes a citizen suit for failure to complete and submit the required forms “under” sections 312(a) and 313(a). The court concluded that this use of the term “under” was a shorthand by which Congress intended to incorporate the timing provisions of sections 312(a) and 313(a) into the “complete and submit” provision of section 326, thereby expanding citizen suit jurisdiction to include cases where compliance had been achieved prior to suit but not in conformity with those timing provisions. See 90 F.3d at 1243.

As recognized by the Sixth Circuit in *Atlantic States v. United Musical Instruments*, the preceding interpretation of the word “under” is very strained. See 61 F.3d at 475. Indeed, it would have required the insertion of only a single word -- “timely,” after the word “submit” in section 326 -- to have stated clearly the intention inferred by the Seventh Circuit. The legislature’s failure to insert that single word suggests that the word was not intended to be there and, thus, that Congress did not intend that EPCRA citizen suits would be brought where the subject reports had already been filed prior to such a suit. *Water Quality Ass’n Employees’ Benefit Corp. v. United States*, 795 F.2d 1303 (7th Cir. 1986); cf., *Bennett v. Spear*, 65 U.S.L.W. 4201, 4204 (U.S. Mar. 19, 1997) (Court must take the term “any person” at “face value” in interpreting Endangered Species Act citizen suit provision).

Moreover, the notion that Congress used such a shorthand method to make all of the substantive requirements of EPCRA compliance enforceable by citizens on the same basis as the federal government is highly suspect. Contrary to the Seventh Circuit’s reasoning, it is well-understood that “under” simply means “by reason of the authority of.” See *Archestani v. I.N.S.*, 502 U.S. 129, 135 (1991). It is precisely for such reasons that “attribution of significance” to the term “under” in the Equal Access to Justice Act struck the District of Columbia Circuit as merely “wishful thinking.” *St. Louis Fuel & Supply Co., Inc. v. F.E.R.C.*, 890 F.2d 446, 450 (D.C. Cir. 1989).

Finally, the Seventh Circuit’s assertion, 90 F.3d at 1243, that the district court’s plain language interpretation “would render gratuitous the compliance dates for initial submissions which Congress placed” in the statute is simply wrong. The Seventh Circuit borrowed this notion, apparently without consideration, from *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.*, 772 F. Supp. 745, 750 (W.D.N.Y. 1991). Although apparently not considered by the Seventh Circuit, a regulated entity such as Petitioner that misses an EPCRA filing deadline faces the specter of a potential government enforcement action long after a belated filing is made.^{4/} Thus, the suggestion that the plain meaning interpretation would render compliance with EPCRA’s filing dates “gratuitous” simply disregards the practical realities that govern here.

In short, the plain language of the EPCRA citizen suit provision establishes that Congress intended to limit such suits to cases of ongoing failures to “complete and file” the requisite reports. There was no failure to “complete and file” in this case,

^{4/} Although its applicability to EPCRA has not been specifically addressed, see *Atlantic States v. United Musical Instrument*, 61 F.3d at 475 n.4, a five-year statute of limitations generally applies to federal actions for assessment of civil penalties. See 28 U.S.C. § 2462.

and the district court, accordingly, correctly concluded that it lacked jurisdiction.

B. Section 326 Of EPCRA Was Based On The Same Citizen Suit Template That This Court Ruled In *Gwaltney* Does Not Authorize Citizen Suits For Wholly Past Violations

EPCRA is a public disclosure statute and contains no substantive pollution control requirements. The Seventh Circuit would nevertheless interpret EPCRA as conferring greater citizen enforcement authority than is available under the substantive environmental statutes.

The Seventh Circuit disregarded the fact that EPCRA's language is remarkably similar to the citizen suit provisions of the CWA and other environmental laws. Although the Seventh Circuit identified minuscule differences between the citizen suit provisions of EPCRA and the CWA, those differences are insignificant (and certainly do not suggest, as assumed by the Seventh Circuit, that Congress intended that citizen plaintiffs would have *greater* enforcement authority under an information sharing statute than under the substantive environmental laws). For example, the Seventh Circuit noted that EPCRA's venue provision, section 326 (b)(1), uses the past tense of "occur" (*i.e.*, citizen suits "shall be brought in the district court for the district in which the violation *occurred*" (emphasis added)). This is not a meaningful distinction because it is invariably true that *some* violation will have "occurred" in advance of a citizen suit -- otherwise the complaint could not have been filed (also, the distinction relates only to venue and not to the scope of jurisdiction). Although overlooked by the Seventh Circuit, a far more significant point is the use of the present tense in the EPCRA citizen suit provision's requirement for pre-suit notification to "the State in which the alleged violation *occurs*." § 326(d)(1) (emphasis added). This use of the present tense clearly signals a

legislative intent that EPCRA citizen suits would address ongoing violations.^{3/}

In this connection it is particularly important to note that in crafting section 326, Congress relied on its well-defined environmental citizen suit template. See *Hallstrom v. Tillamook County*, 493 U.S. at 23 n.1. Conforming to the pattern of the CWA and other environmental statutes, section 326 requires notice to the federal government, the affected state and the alleged violator at least sixty days in advance of filing suit. Just as is the case under those other environmental statutes, EPCRA prohibits citizen suits where the government has already addressed the noncompliance in question. Furthermore, and again like other environmental laws, EPCRA authorizes federal courts to take jurisdiction without regard to such matters as the amount in controversy or diversity of citizenship. Put another way, EPCRA's citizen suit provision is directly analogous to the citizen suit provisions of the CWA and other environmental statutes, and should be so interpreted. While those statutes give the federal government authority to seek enforcement for wholly past violations, they do not give that authority to private plaintiffs and neither, therefore, does EPCRA.

II. EVEN INTERPRETED IN LIGHT OF EXTRINSIC AIDS, THE SEVENTH CIRCUIT'S RULING THAT FEDERAL COURTS HAVE JURISDICTION OVER PRIVATE CITIZENS' CLAIMS OF WHOLLY PAST VIOLATIONS DOES NOT WITHSTAND SCRUTINY

As already discussed, this is a "plain language" case; resort to extrinsic aids is, therefore, unnecessary (and should not have been relied on by the Seventh Circuit). Nevertheless,

^{3/} The Seventh Circuit erroneously suggests that this use of "occurs" in section 326(d)(1) is not "cast in the present tense." 90 F.3d at 1244. This error is fundamental and further undermines the court of appeals' "plain meaning" analysis.

approaching the case on the same basis as the court of appeals, neither the Clean Air Act ("CAA") Amendments of 1990, EPCRA's legislative history, nor the policy goals served by EPCRA's citizen suit provision -- all of which were relied on by the Seventh Circuit -- produces a result different from the plain meaning interpretation of section 326 of EPCRA.

To begin, confronted with this Court's decision in *Gwaltney* that a citizen suit under the CWA cannot be brought with respect to wholly past violations, the Seventh Circuit engaged in an erroneous argument that *Gwaltney* "is no longer as compelling." 90 F.3d at 1244. The Seventh Circuit's premise for that position is the CAA Amendments of 1990, pursuant to which citizen suit enforcement authority is defined to include certain violations of a "repeated" nature. With that premise, the court reasoned that Congress intended that *all* wholly past violations, under *all* environmental statutes, would be subject to citizen suit enforcement. 90 F.3d at 1244. While the CAA Amendments of 1990 make certain "repeated" violations actionable in a citizen suit under CAA section 304(a)(1),⁶⁷ the Seventh Circuit was certainly incorrect in suggesting that Congress's action in amending the CAA invalidates this Court's *Gwaltney* decision or applies retroactively to EPCRA, an entirely separate statute enacted four years prior to the 1990 CAA amendments.

In this connection it should be noted that the same theory relied on by the Seventh Circuit had been presented earlier to the Sixth Circuit in *Atlantic States v. United Musical Instruments*, and was flatly rejected by that court. The Sixth Circuit explained that such reasoning

⁶⁷ This matter is unclear, as indicated by recent district court decisions. For example, a district court in Georgia concluded that Congress did not intend wholly past violations to be redressable when it amended CAA section 304(a)(1) to allow suits for "repeated" violations. *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561 (N.D. Ga. 1994).

... is unpersuasive since one can argue with at least equal force that by amending the Clean Air Act, but failing also to amend EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time suit is filed. Allowing citizen suits for past violations would render superfluous EPCRA's requirement of sixty-days' notice to the alleged violator. In the absence of explicit congressional language mandating such a result -- as in the amended Clean Air Act -- we must reject [plaintiff's] argument.

61 F. 3d at 477. In short, the CAA Amendments of 1990 are simply irrelevant to the issue before this Court.²⁷

In contrast to the Seventh Circuit's misplaced reliance on extrinsic aids, there is abundant evidence that Congress included the mandatory sixty-day pre-suit notice period in EPCRA for the precise purpose of providing regulated entities with an opportunity to come into compliance, thus rendering a citizen suit unnecessary. As this Court explained in *Gwaltney*:

It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous.

484 U.S. at 60. "Any other conclusion would render incomprehensible [the statute's] notice provision." *Id.* at 59. *Ac-*

²⁷ Industry *amici* agree with Petitioner that, to the extent Congress attempted to make wholly past violations actionable in citizen suits under CAA section 304, such action would conflict with Article III's limitations on standing to sue. See, e.g., *Gwaltney*, 484 U.S. at 70-71 (Scalia, J., concurring in part and concurring in judgment).

cord Hallstrom v. Tillamook County, 493 U.S. at 29 (purpose of citizen suit notice provision is to provide alleged violator with opportunity to bring itself into compliance and render a citizen suit unnecessary, thus striking a balance between encouraging citizen enforcement and avoiding burdening the federal courts with excessive citizen suits). The reasoning of the Seventh Circuit cannot be squared with this Court's precedents.^{8/}

Industry *amici* also note that the Seventh Circuit further reveals its misunderstanding of the purpose of citizen suits when the court states that there would be no incentive to investigate noncompliance with EPCRA if a suit could be cut off by belated compliance and citizens "can't recover [their] costs," *i.e.*, costs of suit and attorney fees. 90 F.3d at 1244. Had Congress intended that citizens should have such additional incentives as an inducement to investigate potential noncompliance, it could have added "bounty hunter" provisions to EPCRA (as it has in other statutes). Moreover, although overlooked by the Seventh Circuit, EPCRA section 326, like other citizen suit provisions, expressly precludes a would-be citizen plaintiff's opportunity to recover pre-suit investigative costs by foreclosing a citizen suit when the government steps in and files an enforcement action during the mandatory pre-suit notice period. In sum, the Seventh Circuit's suggestion that only by allowing EPCRA citizen suits

^{8/} The Seventh Circuit speculates that Congress intended the notice required by section 326(d) of EPCRA to "giv[e] an alleged violator a chance to correct the citizen's information." 90 F.3d at 1244. It would be strange indeed if Congress had had such a limited purpose in mind given that EPCRA's notice provision is essentially the same as the citizen suit notice provisions of the numerous other environmental statutes. Under those other statutes one of the principal purposes of the pre-suit notice requirement is to provide an opportunity to cure the alleged violations.

for wholly past violations will there be an incentive for such citizen suits is invalid.^{9/}

III. THE SEVENTH CIRCUIT'S DECISION WOULD CONFER STANDING TO SUE IN CIRCUMSTANCES WHERE ARTICLE III DOES NOT

Finally, and independent of the preceding points, industry *amici* join The Steel Company's argument that CBE lacks standing under Article III of the Constitution to have its EPCRA suit heard. *Amici* write separately (and briefly) on Article III standing due to the importance of this issue.

A. The issue of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 65 U.S.L.W. at 4203. To satisfy the "case or controversy" requirement of Article III, which is the "irreducible constitutional minimum" for standing, a plaintiff must demonstrate that it has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. *Id.* This test is not satisfied where the plaintiff seeks redress for wholly past violations. Under the view implicit in the Seventh Circuit's opinion, Respondent CBE is deemed to have a personal stake in the litigation suffi-

^{9/} *Amici* also note that the Seventh Circuit's erroneous rationale would apply equally to the Clean Water Act, and has therefore necessarily been refuted by *Gwaltney*.

In addition, contrary to the courts of appeals, EPCRA's legislative history does not support the view that wholly past violations were intended to be subject to citizen suits. The legislative history of EPCRA is sparse and nowhere suggests that Congress intended to depart from its standard approach of building into environmental citizen suit provisions a "cure period" following notice of intent to sue. Indeed, as this Court emphasized in *Hallstrom*, EPCRA's citizen suit provision is typical of a number of other federal environmental laws, see 493 U.S. at 23 & n.1, and the substantial departure envisioned by the Seventh Circuit would certainly have been accompanied by an explanation.

cient to satisfy Article III simply because a federal court could impose civil penalties payable to the United States or declare that in the past The Steel Company had not been in compliance with EPCRA. This view contradicts Supreme Court precedent and exposes industry *amici* to a wave of litigation from citizens seeking to vindicate a generalized interest in environmental matters.

In seeking civil penalties but not injunctive relief (because there is nothing to enjoin), CBE acted not on its own behalf but rather on behalf of a broader public interest. Because it is undisputed that The Steel Company was in compliance before CBE's suit was filed, CBE's sole interest in the outcome of this case is to have the federal government punish The Steel Company for delayed compliance. Under the rulings of this Court, however, such an interest is insufficient to confer standing. That is because an interest shared generally with the public at large in the proper implementation of or adherence to public laws is not the "concrete and particularized" injury that is the predicate for Article III standing. See *Arizonans For Official English v. Arizona*, 117 S. Ct. 1055, 1067 (1997), (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).¹⁰ Moreover, this Court has consistently held that a prospective award of attorney fees does not confer Article III standing where the plaintiff alleges only wholly past violations. *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986) (standing requires injury with nexus to substantive character of the statute at is-

¹⁰ See also *Gwaltney*, 484 U.S. at 70-71 (Scalia, J., concurring in part and concurring in the judgment) ("If it is undisputed that the defendant was in a state of compliance when this suit was filed, the plaintiffs would have been suffering no remediable injury in fact that could support suit" and "there cannot possibly be standing to sue"). In this connection, it should also be noted that the United States has previously argued before this Court that Article III standing is absent where a citizen plaintiff's suit is based on wholly past violations. See Brief of the United States as *Amicus Curiae* Supporting Affirmance, Case No. 86-473, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, at n. 34.

sue; claim for fee award insufficiently related to Illinois law regulating abortion).

Limited, therefore, to seeking punishment of The Steel Company through penalty payments to the government, Respondents' suit does not seek redress for concrete, particularized injury to CBE, but rather vindication of an interest shared equally by the public at large. Article III, however, excludes vindication of such generalized interests from the purview of the federal courts. Put another way, the generalized interest that CBE seeks to advance is identical to the "undifferentiated public interest" and is not one that federal courts were intended to hear. *Marbury v. Madison*, 5 U.S. (Cranch) 137 (1803). If such generalized concerns could be the premise for federal court jurisdiction the litigation burden would be overwhelming and the effect on the rights of the public deleterious.¹¹

B. Although the Seventh Circuit did not examine the Article III flaw in CBE's case, its assumption, discussed *supra*, that absent the recovery of attorneys fees citizen groups will not investigate potential EPCRA noncompliance, suggests that the Seventh Circuit projects a role for environmental citizen suits that is fundamentally different from that recognized in previous decisions of this Court. The Seventh Circuit (and certain district courts) envision citizen suits as private actions and focus on the need to provide a reward for investigating wrongdoing. Of course, when the recovery of fees is the focus, the matter is in essence a private concern and the standing issue is less problematic. Industry *amici* acknowledge that had Congress premised EPCRA's citizen suit provision (or, for that

¹¹ Lawyers at the U.S. Environmental Protection Agency have noted the ease with which EPCRA citizen suits in particular can be filed and prosecuted, calling such cases "a rewarding and lucrative practice area for private attorneys general." M.J. Walker & J.D. Jacobs, "EPCRA Citizens Suits: An Evolving Opus with a Discordant Note," *The Journal of Environmental Law & Practice* (Jan./Feb. 1997) at 20.

matter, other citizen suit provisions) on a private bounty mechanism, there could be honest debate about whether wholly past violations would be sufficient for Article III standing. But Congress intended achieving compliance with public law as the first priority of citizen suits, and collection of attorneys fees is secondary. Congress assumed that citizens would investigate environmental wrongs for the benefit of the public, not merely to collect fees. With this relationship properly understood, a serious argument that wholly past violations are sufficient to support Article III standing cannot be maintained.

As a consequence of the Seventh Circuit's ruling, EPCRA enforcement authority will be shared equally by EPA and citizen groups. This is not what Congress intended.^{12/} In *Gwaltney*, the Court noted that where EPA had issued a compliance order and agreed to undertake "some extreme corrective action" a citizen should not be allowed to sue months or years later to seek the penalties that EPA chose to forego. 484 U.S. at 61. With the Seventh Circuit's decision in place, private plaintiffs would have license to sue even where EPCRA violations were cured prior to the suit and had been subject to EPA enforcement. *Id.* But as this Court emphasized in *Gwaltney*, that "interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive." *Id.* This is not the direction in which the federal courts should take EPCRA.

^{12/} It should be noted that EPA's enforcement of EPCRA has been diligent. More than 200 administrative enforcement actions were concluded in 1995. *EPA, FY 1995 Enforcement and Compliance Assurance Accomplishments Report* (1996). EPA Region V declined to file an enforcement action against Petitioner in this matter, obviously viewing the situation as a very small company's relatively minor violation that was promptly cured. But Region V has been far from lax in enforcing EPCRA; as of March 3, 1997, it had filed 86 separate complaints for EPCRA reporting violations, resulting in 71 settlements and the imposition of \$3.5 million in total fines. The federal government's EPCRA cop is on the beat.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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No. 96-643

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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL
AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

**BRIEF AMICI CURIAE OF NATURAL RESOURCES
DEFENSE COUNCIL, INC., SIERRA CLUB, UNITED
STATES PUBLIC INTEREST RESEARCH GROUP,
FRIENDS OF THE EARTH, ATLANTIC STATES LEGAL
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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

The primary purpose of the Emergency Planning and Community Right-to-Know Act (EPCRA) is to inform the public about releases of toxic chemicals by manufacturing facilities to the environment. EPCRA gives citizens a right to know what those chemicals are, where they are, and how much of them is present.

The thirteen organizations submitting this brief have a direct and substantial interest in this information and in enforcing EPCRA.² Their members live, breathe the air, and engage in recreational activities in areas affected by releases of toxic chemicals by companies regulated under EPCRA. These toxic chemicals are known to cause significant adverse effects on human

¹Letters confirming that petitioner and respondent consent to the filing of this brief have been filed with the Clerk of the Court. No counsel for any party had any role in authoring this brief, and no person other than the named *amici* and their counsel made any monetary contribution to its preparation or submission.

²The following not-for-profit organizations (with their state of incorporation and membership information in parentheses) join in this brief: Natural Resources Defense Council, Inc. (New York—more than 170,000 members nationwide), Sierra Club (California—more than 500,000 members nationwide), Friends of the Earth (New York—approximately 13,000 members nationwide), Atlantic States Legal Foundation (New York—thousands of members nationwide), Tennessee Environmental Council (Tennessee—over 1,100 individual members and 43 member organizations statewide), The Ecology Center of Ann Arbor, Inc. (Michigan—members throughout Michigan), Communities for a Better Environment (California—12,000 members statewide), Cold Mountain, Cold Rivers, Inc. (Montana—members throughout Montana and the United States), Don't Waste Arizona, Inc. (Arizona—approximately 5,000 members statewide), Citizens for Environmental Compliance (North Carolina—about 20 members statewide), United States Public Interest Research Group (Washington, D.C.—over 25,000 members nationwide). U.S. PIRG also acts as the national lobbying office for state PIRGs. Collectively, state PIRGs have over 1 million members nationwide. Ecological Consultants for the Public Interest is a national non-profit public interest consulting firm based in Boulder, Colorado that represents clients in a variety of enforcement and advocacy activities under EPCRA, including citizen suits. Trial Lawyers for Public Justice is a national public interest law firm based in Washington, D.C. and specializing in precedent-setting and socially significant tort, trial and environmental litigation. TLPJ's Environmental Enforcement Project uses citizen suits to enforce compliance with federal environmental laws, including EPCRA.

health and the environment. *Amici's* members use data reported by facilities under EPCRA to learn about toxic chemical releases in their communities. The interests of *amici's* members and their right to know about such releases is adversely affected whenever companies fail to file required and timely reports under EPCRA.

The thirteen organizations also have organizational interests in enforcing EPCRA. These *amici* research and use data reported by facilities under EPCRA. Based on these data, *amici* report to their members and the public about releases of toxic chemicals to the environment, advocate changes in environmental regulations and statutes, encourage companies to reduce their use of toxic chemicals, and seek to promote the effective enforcement of environmental regulations and statutes. *Amici* have also researched public files to identify companies which have failed to file required reports under EPCRA and have brought citizen suits against such companies.

Petitioner's interpretation of EPCRA would allow non-reporting companies to avoid all liability in citizen suits if they file the reports after receiving a citizen's notice letter and before the citizen files suit. Filing these reports is a simple act that can invariably be accomplished in a few days or weeks. Consequently, this interpretation would allow any EPCRA violator to delay compliance until it is notified of a citizen suit, and then to easily avoid any legal consequences for its violations.

This outcome would destroy the deterrent effect of civil enforcement, in two ways. First, it would discourage voluntary compliance and reward noncompliance by the regulated community. Second, it would mean that citizen investigations and enforcement efforts against violators are a waste of time and resources, because those violators would have a foolproof and simple defense in nearly every case. It is therefore critical that this Court affirm the decision below and reaffirm the right of citizens to sue for violations of EPCRA's reporting requirements.

SUMMARY OF ARGUMENT

The language and structure of EPCRA show that Congress intended to give citizens a cause of action to enforce reporting violations, without any temporal limitation. Congress defined citizen authority to sue in a functional sense. Under EPCRA, citizens can sue persons for "failure to complete and submit" required reporting forms. Unlike the Clean Water Act, EPCRA does not contain any word which ties the citizen's cause of action to the time that the citizen's complaint is filed. A failure to submit an EPCRA form will always be a past violation. Congress provided that EPCRA violators "shall be liable" for civil penalties for every day that such violations occur. Congress gave no indication in EPCRA that a violator's liability for civil penalties can be excused or negated by corrective action.

The scope of citizen enforcement should be determined solely on the basis of the statutory conditions enacted by Congress. This Court's general statements in *dicta* in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), concerning the role of citizen enforcement under the Clean Water Act should not be applied outside of that case and elevated above the specific language chosen by Congress in EPCRA.

CBE meets both the injury-in-fact and redressability requirements for standing. CBE's members in Chicago have informational, environmental and procedural interests which are harmed by The Steel Company's failure to disclose its releases of tons of extremely hazardous hydrochloric acid into Chicago's air. CBE's members' injuries will be redressed by an assessment of civil penalties, because Congress has found that those penalties will deter petitioner specifically and other companies generally from violating EPCRA. In addition, the potential relief includes pollution reduction projects that could directly benefit CBE's members.

Finally, permitting citizens to sue for past violations would not burden the federal courts with a flood of citizen suits, interfere with government enforcement activities, or contravene any constitutional requirements.

ARGUMENT

I. THE PLAIN LANGUAGE OF EPCRA AUTHORIZES CITIZENS TO SEEK CIVIL PENALTIES FOR A FAILURE TO FILE TIMELY REPORTS

It is fundamental that Congress decides "who may enforce [statutory rights] and in what manner." *Davis v. Passman*, 422 U.S. 228, 241 (1979). Congress defines the role of citizens in enforcing EPCRA. The nature of that role is set forth in the statutory text. It is therefore critical to examine the pertinent statutory language and apply traditional rules of statutory construction.

A citizen suit under EPCRA is a hybrid cause of action to vindicate a mixture of private and public rights. A citizen enforces EPCRA "on his own behalf." 42 U.S.C. § 11046(a). He therefore asserts his own private right to be free of harm from violations of EPCRA. In that sense, the citizen is a private litigant. However, the citizen also has remedial authority equivalent to that of the government, because he can seek to "enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." 42 U.S.C. § 11046(c). In that sense, the citizen is a private attorney general.

The scope of the citizen's cause of action as a private attorney general is defined in 42 U.S.C. § 11046(a)(1)(A), which lists four EPCRA requirements that citizens can enforce against owners or operators of facilities. The enforceability of these requirements is limited in only one respect. The first clause of 42 U.S.C. § 11046(a) authorizes citizen suits "[e]xcept as provided in subsection (e)." Subsection (e), in turn, is described in its heading as a single "[l]imitation," and provides that citizens cannot sue if EPA is already pursuing civil or administrative enforcement of the same violation. 42 U.S.C. § 11046(e). Thus, citizens can sue to enforce the four EPCRA requirements in 42 U.S.C. §

11046(a)(1)(A) whenever EPA does not.³

If the suit is one to enforce one of these four requirements, citizens have the same power to seek civil penalties that EPA does. EPCRA is quite clear on this. Under section 325 of EPCRA, EPA "may bring an action to assess and collect the penalty in the United States District Court" for a failure to submit the forms required by section 312 or 313. 42 U.S.C. § 11045(a)(1), (4). Similarly, under section 326, the district court in citizen suits "shall have jurisdiction * * * to impose any civil penalty provided for" a failure to submit those forms. 42 U.S.C. § 11046(c)(emphasis added). The penalty reference in the citizen suit provision in section 326 is to the federal government's civil penalty authority in section 325. Thus, for these types of violations, the penalty authority in EPA suits and citizen suits is coextensive.

The central issue in this case is whether Congress intended to limit citizen authority to seek civil penalties based on the timing of certain events relating to the violations of EPCRA. It is important to separate and define these events, place them in a common frame of reference, and then analyze how they relate to federal jurisdiction and the existence of a citizen cause of action. The timing of four events is relevant: the violation, penalty liability, cessation of the violation, and the filing of the complaint.

First, there is the timing of the violation itself. The violation in this case is the failure to submit required forms. For section 312, the form must be submitted annually on March 1. 42 U.S.C. § 11022(a)(2). For section 313, the form must be submitted annually on July 1. 42 U.S.C. § 11023(a). The violation occurs on the first day after the date on which the company was required to submit the required form. In this case, petitioner violated section 312 on March 2 of each year from 1988 through 1995, and violated section 313 on July 2 of each year from 1988 through 1995. Pet. App. A8; J.A. 7-10.

³The legislative history supports this conclusion, indicating that EPCRA "allows citizens the right to sue in cases where the law is not enforced or the Government has not performed its mandated duties." 132 Cong. Rec. 29758 (1986)(Rep. Coats).

Second, there is the timing of penalty liability for those violations. Under section 325(c)(1), any person "who violates any requirement of section 312 or 313 shall be liable to the United States for a civil penalty." 42 U.S.C. § 11045(c)(1). In addition, Congress provided that "[e]ach day a violation * * * continues shall * * * constitute a separate violation," subject to a separate daily assessment of civil penalties. 42 U.S.C. § 11045(c)(3). This means that penalty liability first attaches on the date of each violation, and continues to attach on each subsequent day until the report is filed.⁴ See *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 890 F.2d 690, 696 (4th Cir. 1989).

Liability for penalties must begin with the happening of an event that occurred in the past. All violations of EPCRA, by necessity, will be "past" violations. A citizen cannot bring a citizen suit until the violations occur. The violations cannot occur until after the filing deadline passes, in the same sense that taxpayers cannot violate the filing deadline for their income tax forms until after April 15 of each year. In addition, civil penalties can only be imposed for "past" violations. A civil penalty cannot be imposed on violations before they occur.

Third, there is the time that the defendant ceases its violation. Nothing in EPCRA states that a defendant's cessation of a reporting violation absolves it of liability for civil penalties for that violation. EPCRA contains no defenses to liability.⁵ It is a strict liability statute. If there is a violation, a penalty "shall" be imposed. 42 U.S.C. § 11045(c)(1). Consequently, an action for

⁴Thus, if a required report is filed five days late, that constitutes five separate days of violation. Those violations do not lapse or disappear on the sixth day, when the belated report is filed.

⁵The 60-day notice requirement is not designed to give the violator an opportunity to cure its violation and avoid suit. Notice gives EPA an opportunity to exercise its primary enforcement authority, and gives the violator an opportunity to settle admitted violations or to head off misdirected litigation over disputed violations.

penalties is intrinsically incapable of being negated or rendered moot by a defendant's corrective action.⁶ The only issue is how much the penalty should be, and that issue is within the district court's discretion to decide.

Fourth, there is the time that the citizen plaintiff files its complaint. This may occur before or after the defendant ceases its violations by filing its reporting form. If it is before the complaint is filed, or there is a risk of ongoing violations on or after that date, the violations are "ongoing." *Gwaltney*, 484 U.S. at 65. If it is after the complaint is filed, and there is no risk of ongoing violations thereafter, the violations are "wholly past." *Id.* at 56. The controversy in this case is about the jurisdictional and legal significance of that date under EPCRA.

To resolve this controversy, it is necessary to focus on the authorizing language that Congress used for citizen suits. A citizen plaintiff can file a complaint against an owner or operator of a facility "for failure to * * * complete and submit" a required reporting form "under" sections 312(a) or 313(a). 42 U.S.C. § 11046. There is no temporal limitation in this language. Indeed, the language has no temporal component at all. Instead, the

⁶A defendant's voluntary cessation of its unlawful conduct will not cause mootness, "especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Four Circuits have held that, even if a defendant has cured its permit violations under the Clean Water Act since the citizen suit was filed, claims for civil penalties for past violations prevent the case from being moot. *NRDC v. Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 502-504 (3d Cir. 1993); *Atlantic States Legal Foundation v. Pan American Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993); *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1135-37 (11th Cir. 1990); *Gwaltney*, 890 F.2d at 696. A contrary rule "would weaken the deterrent effect of the Act by diminishing incentives for citizens to sue and encourage dilatory tactics by defendants." *Texaco, supra*, 2 F.3d at 503-04. While these decisions focused on mootness by post-complaint compliance, the same reasoning applies to pre-complaint compliance. In both cases, allowing compliance to defeat a citizen suit would negate civil penalty authority and constrict the scope of citizen suits authorized by Congress. There is no principled basis for distinguishing between post-complaint and pre-complaint compliance as a defense to citizen suits for civil penalties.

language is purely functional--citizens can sue persons who violate these statutory sections by failing to submit the required forms.⁷

The phrase "failure to complete and submit" is synonymous with either "violates" or "violated." A person who fails to complete and submit the required form "violates" EPCRA. Similarly, a person who has failed to complete and submit the required form has "violated" EPCRA. Substituting either the present or past tense of the verb does not change the meaning of the statute. Congress did not use the English language in a temporal or historical sense. It used the English language in a functional sense.⁸

In this regard, the citizen suit provision in EPCRA is different from those in the Clean Water Act and the amended Clean Air Act. The CWA provision authorizes citizens to sue a person who "is *alleged* to be in violation" of that statute. 33 U.S.C. § 1365(a)(emphasis added). The CAA provision authorizes citizens to sue a person who "is *alleged* to have violated (if there is

⁷Congress has frequently used the "failure to do" something in a functional sense as the basis for imposing penalties for past violations. See, e.g., 26 U.S.C. § 6651 (imposing penalties for "failure to file" tax returns); 49 U.S.C. § 11901(i)(1) (imposing penalties for "failure to make, prepare, or preserve" a report to the Interstate Commerce Commission). Congress intended to allow the federal government to impose penalties for untimely reporting under those statutes. For example, under 26 U.S.C. § 6651, if a person fails to file a tax return, a penalty is imposed despite any attempt to file a late return. *Plunkett v. Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941). Thus, these words are used in a functional, not a temporal, sense, and provide no basis for limiting the application of penalties to ongoing violations.

⁸This same functional usage is apparent in the federal enforcement section. The verbs describing the federal government's authority to file a civil action are stated in the present tense. 42 U.S.C. § 11045(c) (U.S. may sue "[a]ny person who violates" EPCRA or "who fails to furnish" required information under EPCRA). So are the verbs in the federal enforcement section of the Clean Water Act. 33 U.S.C. § 1319 (U.S. may sue any person who "is in violation" of the CWA). Yet "it is little questioned that the Administrator [of EPA] may bring enforcement actions to recover civil penalties for wholly past violations * * *." *Gwaltney*, 484 U.S. at 58.

evidence that the *alleged* violation has been repeated) or to be in violation of" that statute. 42 U.S.C. § 7604(a)(1)(emphases added). Both of these provisions use the word "alleged." That word must refer to the allegations in the plaintiff's complaint. In so doing, Congress created a temporal frame of reference based on the date that the complaint was filed. The timing of the violation (*i.e.*, whether it is wholly past or ongoing) and the right to sue are measured against that date.

In contrast, EPCRA does not contain the word "alleged" or any other similar term referring to the time that the complaint is filed. Instead, it contains a functional phrase which refers to the violation. As we have seen, an EPCRA violation "occurs" when the required form is not filed by the due date, and continues to occur on every day thereafter until it is filed. Consequently, a citizen suit may be filed whenever such a violation has occurred, subject only to prior government enforcement action and the applicable statute of limitations.⁹

The plain language and structure of EPCRA therefore authorize citizen suits for untimely reporting. Since "the intent of Congress is clear from the plain meaning of the statutory provision, that [is] the end of the judicial inquiry." *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

II. THE CITIZEN'S ROLE IN ENFORCING EPCRA IS DEFINED BY THE STATUTORY LANGUAGE, NOT BY THIS COURT'S STATEMENTS IN *GWALTNEY*

A major source of the error in petitioner's interpretation of EPCRA is its misapplication of this Court's *Gwaltney* decision. In that case, the Court addressed the issue of whether the citizen suit provision of the Clean Water Act authorizes citizen plaintiffs to file suit against violators of that Act who have "completely * * * eradicated" the potential for further violations. 484 U.S. at 70

⁹The applicable statute of limitations for actions to enforce a penalty is five years. 28 U.S.C. § 2462. *Sierra Club v. Chevron U.S.A.*, 834 F.2d 1517, 1521 (9th Cir. 1987).

(Scalia, J., concurring). Focusing on the particular language and history of the Clean Water Act, this Court concluded that Congress had not intended such a result. In the course of this analysis, the Court noted that the Clean Water Act's disallowance of citizen suits when the government had already filed suit against the violator "suggests that the citizen suit is meant to supplement rather than supplant governmental action." *Id.* at 60. Further, the Court reasoned that limiting Clean Water Act citizen suits to "ongoing" violations could be seen as consistent with the "interstitial" role of such suits. *Id.* at 61. Following the lead of the Sixth Circuit in *Atlantic States Legal Foundation v. United Musical Instruments*, 61 F.3d 473, 477 (1995), petitioner seeks to use this language from *Gwaltney* to transform that opinion into a quasi-constitutional charter governing all federal citizen suit provisions, regardless of the particular language chosen by Congress.¹⁰

This approach is wrong-headed for two important reasons. First, it violates the basic principle that, as this Court stressed in *Gwaltney*, "the language of the statute itself" must be the focal point of analysis in determining Congressional intent. 484 U.S. at 56. The particular language and history of EPCRA, and not the statements of this Court in interpreting another statute, should determine whether respondent's suit can go forward. Allegiance to

¹⁰Other courts have similarly read this language broadly to imply that citizens compete with government enforcers for the same public remedy and that any duplication between citizen and government enforcement is impermissible. The courts have quoted and relied on the "supplement or supplant" phrase in several decisions in which citizen suits were found to be barred by prior government enforcement action. *North and South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 555, 558 (1st Cir. 1991); *Arkansas Wildlife Federation v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376, 380 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1094 (1995). For a detailed analysis of why these cases are wrongly decided, see Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 54 Maryland L. Rev. 1552, 1632-47 (1995); Hecker, *The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both*, 8 Natural Resources & Env't 31-34, 61-62 (Spring 1994).

the language of the statute is especially important here because, as discussed in Part I above, the language of EPCRA's citizen suit provision differs from its Clean Water Act counterpart in certain critical respects.

Second, this Court's statements in *Gwaltney* were merely a general description of the Congressional scheme under the CWA, not an invitation to rewrite the citizen suit provisions in all federal environmental laws. Unquestionably, citizen suits do "supplement," i.e., "add to," agency enforcement. Citizens can supplement agency enforcement by commencing suits whenever the specific limitations on such suits do not apply. Furthermore, citizen suits cannot "supplant," i.e., "supersede," agency enforcement. EPA always has the ultimate power to block or limit a citizen suit by taking judicial and administrative action.¹¹ In addition, by allowing citizens to seek penalties for "wholly past" violations of EPCRA only where EPA has not done so, Congress has preserved the subordinate ("interstitial") role of citizen suits, while at the same time emphasizing the important deterrent effect of penalty actions.¹²

¹¹EPA can completely block a citizen suit by filing a prior lawsuit or administrative action. 42 U.S.C. § 11046(e). EPA also has an absolute right to intervene in any citizen suit. *Id.*, § 11046(h). In addition, in analogous cases under the CWA, the courts have held that the filing of a citizen suit does not bar EPA from filing a subsequent judicial or administrative action involving the same violations. *U.S. v. Atlas Powder*, 26 Env't Rep. Cases (BNA) 1391, 1392 (E.D. Pa. 1987).

¹²In its discussion of the "interstitial" role of citizen suits under the Clean Water Act, the Court posited a hypothetical which assumed that EPA agreed in an administrative order "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action * * * that it otherwise would not be obligated to take." 484 U.S. at 60-61. The Court then stated that, if citizens filed suit for the same past violations and could seek penalties that EPA chose to forgo, it would interfere with EPA's enforcement discretion. This hypothetical is inapplicable to EPCRA, since diligently prosecuted EPA administrative orders preclude a citizen action for the same violations. 42 U.S.C. § 11046(e). To the extent that this hypothetical suggests that an EPA decision not to enforce a violation at all is binding on citizens, that proposition "flies in the face of the clear language of the citizens' action provision

However, petitioner cannot use this Court's statements in *Gwaltney* as a basis for overriding Congress' decision to provide affected citizens with the right to seek penalties for past violations.¹³

In this case, the Seventh Circuit refused to "apply the holding of *Gwaltney* directly" to rewrite EPCRA in the manner that petitioner suggests, because "the first teaching of that case is to read a statute according to its most plain and natural meaning." 90 F.3d at 1242. Similarly, in *Wash PIRG v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (1993), the Ninth Circuit stated that the "supplement rather than supplant" language in *Gwaltney* "cannot persuade us to abandon the clear language that Congress used when

of the CWA, as well as the legislative history, which make clear that agency inaction is precisely the circumstance in which private action is appropriate." *EPA v. City of Green Forest*, 921 F.2d 1394, 1405 (8th Cir. 1990), cert. denied, 502 U.S. 956 (1991).

¹³In the 1990 amendments to the Clean Air Act, Congress rejected the Dole-Nickles-Heflin amendment which would have applied the *Gwaltney* principle to citizen suits for civil penalties under that statute. 136 Cong. Rec. 6442 (1990). In the debates on that amendment, several Senators objected strongly to the *Gwaltney* decision. See, e.g., id. at 5277 (remarks of Sen. Lautenberg) (*Gwaltney* "undermine[s] the principle established by Congress in 1970—that the standards for which enforcement would be sought, either through administrative enforcement or citizen enforcement, are the same. Both EPA and citizens should have authority to sue for wholly past violations"); id. at 5279 (remarks of Sen. Chaffee) (the Nickles amendment is "a very, very strange provision"); id. at 5286 (remarks of Sen. Durenberger) ("[t]he *Gwaltney* problem can be fixed. It is not a defect in every environmental statute."); id. at 5354-55 (remarks of Sen. Baucus) ("[t]here is no justification for allowing polluters to enjoy the unjust enrichment gained by failing to comply in the past even if they comply in the present"); id. at 5357-58 (remarks of Sen. Mitchell) ("the outcome [in *Gwaltney*] is inappropriate because it provides no penalty to sources that have violated the act in the past"). On the House side, Rep. Collins stated that, "[i]n almost all of our laws across the country, a past violation is treated as a sufficient wrong to give rise to legal action. There is no reasonable justification for treating violations of the Clean Air Act differently." Id. at 11918.

it drafted the [CWA]."¹⁴

The courts which have relied on *Gwaltney* to limit citizen suits have given too little consideration to the statutory text that actually defines the citizens' cause of action. As *Gwaltney* recognized, the scope of citizen enforcement should be determined solely on the basis of the statutory conditions enacted by Congress. Viewed on that basis, Congress intended citizens to be able to sue for untimely EPCRA reports when EPA has not taken enforcement action.

III. CBE HAS STANDING TO SUE FOR PENALTIES FOR WHOLLY PAST VIOLATIONS

Petitioner also argues that a citizen plaintiff cannot satisfy the "injury-in-fact" and redressability requirements for Article III standing in a suit based solely on wholly past violations. Pet. Br. 34-41. However, petitioner is incorrect.

A. CBE Has Sufficiently Alleged Injury-in-Fact

CBE has alleged three types of "injury-in-fact" which satisfy Article III standards: informational, environmental, and procedural.

First, EPCRA protects CBE's informational interests. EPCRA creates a "right to know" about the nature and amount of toxic chemicals in citizens' communities. The statute provides that the required reporting forms "shall be available * * * to inform persons about releases of toxic chemicals to the environment * * *." 42 U.S.C. § 11023(h). The Conference Report states that "[t]he information collected under this section is intended to inform the general public and the communities surrounding covered facilities about release of toxic chemicals, to assist research, to aid

¹⁴See also *Citizens for a Better Environment v. Union Oil Co.*, 83 F.3d 1111, 1118 (9th Cir. 1996), cert. denied, 117 S.Ct. 789 (1997); *Coalition for a Liveable West Side v. NYC Dept. of Environmental Protection*, 830 F. Supp. 194, 197 (S.D.N.Y. 1993).

in the development of regulations, guidelines and standards, and for other similar purposes." H. Rep. No. 962, 99th Cong., 2d Sess. 299 (1986). CBE's members live in the community near petitioner's facility and have been injured by the lack of information that resulted from petitioner's failure timely to file the reports required by the statute. J.A. 5. This informational injury continues after belated report is filed, because it can take months for EPA to update the publicly-accessible computerized data base that Congress required EPA to maintain. 42 U.S.C. § 11023(j).

It is well-established that informational injury, by itself, is a sufficient injury to confer standing. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982), the Court held that injury to the "statutorily created right to truthful housing information" was sufficient for constitutional purposes. The statute in *Havens* is an example of "statutes creating legal rights, the violation of which creates standing." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). EPCRA creates a similar right to know about the storage and release of toxic chemicals in one's community.¹⁵

Second, EPCRA protects CBE's members from environmental injury, both directly and indirectly. EPA has described the direct form of protection, in which government uses EPCRA information to protect the nearby community from chemical releases:

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs) and Local Fire Departments (LFDs). This enables states and local communities to plan for and respond effectively to

¹⁵Courts have upheld the informational standing of plaintiffs to sue persons who have failed to report releases of toxic chemicals. *Atlantic States Legal Foundation v. Buffalo Envelope*, 823 F. Supp. 1065, 1067-72 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition v. Kurz-Hastings*, 813 F. Supp. 1132, 1138-41 (E.D. Pa. 1993); *Heart of America Northwest v. Westinghouse Hanford*, 820 F. Supp. 1265, 1271-73 (E.D. Wash. 1993).

chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment or ecosystems which could be damaged by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

EPA, *Interim Revised Supplemental Environmental Projects Policy*, May 8, 1995, pp. 9-10.¹⁶ CBE's members therefore face an increased risk of environmental harm from inadequate emergency preparedness when companies like The Steel Company fail to disclose information. The government and the community did not know that extremely hazardous chemicals were present at the facility, and could not plan for emergencies, spills, or releases of such chemicals. Untimely reporting may make emergencies more serious, and could result in injury or death to members of the community.

The risk of environmental harm in this case is serious. Petitioner failed to disclose that it was releasing as much as 14 tons per year of hydrochloric acid into Chicago's air. EPA has listed the aerosol form of hydrochloric acid as a "toxic chemical" under EPCRA. 40 C.F.R. § 372.65; 61 Fed. Reg. 38600, 38603 (July 25, 1996). Hydrochloric acid is "acutely toxic to all human tissue, producing effects ranging from irritation to corrosion to risk of early death." 60 Fed. Reg. 57382, 57384 (Nov. 15, 1995). EPA considers this chemical to be an "extremely hazardous substance" (EHS). *Id.* at 57385; 42 U.S.C. § 11004; 40 C.F.R. § 355.40; *id.*, Part 355, App. A. According to EPA, "EHSs are acutely toxic chemicals which cause both severe short- and long-term health effects after a single, brief exposure." 61 Fed. Reg. 20473, 20475 (May 7, 1996). EPA has also stated that "reporting of EHS

¹⁶This policy is available on the World Wide Web at <http://es.inel.gov/comply/oeca/policy.html>.

releases is required because EHSs are acutely toxic and will potentially pose an immediate hazard upon release." *Id.* at 20476. Thus, EPCRA directly protects against this form of harm.

The indirect form of protection arises when the companies making the disclosures reduce their chemical usage. Congress believed that required disclosure, by itself, would encourage this result. Representative Sikorski made this point during the House debates on the conference version of the bill:

Community Right-to-Know lifts the veil of ignorance which has created mistrust and antagonism between community members and local industry. Community Right-to-Know will guarantee open access to information, dispelling the atmosphere of mistrust and replacing it with one in which community members and industry can openly cooperate in addressing the problems of toxic waste. Safe companies will be rewarded by a community knowledgeable of their good record in handling hazardous products, and unsafe companies will have a powerful incentive to clean up their act.

132 Cong. Rec. 29747 (1986)(emphasis added). Congress drew a direct connection between compliance with EPCRA's disclosure requirements and reductions in pollution in nearby communities. Congress viewed the disclosure of information, by itself, as an inducement to companies to reduce their pollution. Thus, corporate secrecy encourages remedial inertia, while the spotlight of corporate disclosure encourages remedial action. Furthermore, this action can continue past the date that the form is filed. The filing of the form is just the beginning of the cooperative process that Congress envisioned to reduce pollution.¹⁷

¹⁷Congress continued this same theme when it enlarged the scope of EPCRA reporting by enacting the Pollution Prevention Act of 1990. 42 U.S.C. §§ 13101, *et seq.* According to its main sponsor, Senator Lautenberg, that Act "is designed to foster efforts to eliminate or reduce pollution before it is generated." 136 Cong. Rec. S 17523 (daily ed., Oct. 27, 1990). One method to achieve that

In these two ways, petitioner's past EPCRA violations have caused environmental harm to CBE's members. In addition, petitioner's longstanding history of such violations creates a significant risk of future EPCRA violations and threatens to cause additional harm. This is a legally cognizable injury for standing purposes.

Third, CBE's members have suffered procedural injury. This Court stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992), that a plaintiff may have standing to challenge the failure to follow a procedural requirement if that requirement was "designed to protect some threatened concrete interest" of the plaintiff. *Id.* at 573 n.8. In the present case, the procedural injury arises from petitioner's failure to file required reports of its releases of toxic chemicals into the Chicago area. The reporting requirement was designed to protect the concrete informational and environmental interests of citizens, like CBE and its members, who live near pollution sources.

CBE therefore meets the "injury-in-fact" requirement for Article III standing. Its members have the same informational, environmental, and procedural injuries that the EPCRA regulatory system was designed by Congress to prevent.

goal was a new requirement that industry disclose its pollution prevention efforts in its EPCRA reports. As Senator Lautenberg stated, "industry would be required to provide data on source reduction and recycling efforts as part of their reporting requirements under the Right-to-Know Program." *Id.* Thus, Congress expected that disclosure of that data would foster pollution reduction. That expectation has proven to be correct. In 1995, President Clinton stated that "[s]haring vital [Toxics Release Inventory] information with the public has provided a strong incentive for reduction in the generation, and, ultimately, release into the environment, of toxic chemicals." Exec. Order No. 12969, 60 Fed. Reg. 40989 (Aug. 10, 1995). Congress has therefore found that requiring disclosure of EPCRA information protects both the informational and environmental interests of residents in nearby communities.

B. CBE's Pursuit of Civil Penalties Deters Further Violations and Therefore Redresses Its Injuries

The third prong of standing analysis requires that CBE establish that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *U.S. v. Hays*, 115 S. Ct. 2431, 2435 (1995) (quoting *Defenders of Wildlife*, 504 U.S. at 561). To meet this requirement, then, CBE must show that it is likely to benefit from a decree in its favor.

At the outset, we note that, since CBE "has been accorded a procedural right to protect [its] concrete interests," it "can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7. In such cases, the primary focus of the standing inquiry is whether plaintiff has sued a defendant who has caused that injury. The Court suggested in *Defenders* that plaintiffs living near a site for a proposed federal dam would have procedural standing to sue if the licensing agency failed to prepare an EIS, even though the EIS might have no impact on the plans for the dam. *Id.* Similarly, CBE has standing to sue petitioner for its failure to submit EPCRA reports, even if the filing of those reports may not reduce the impact of releases of toxic chemicals in the community in which CBE's members live.

Even if this procedural injury alone were insufficient, CBE's pursuit of civil penalties satisfies redressability standards. Petitioner argues that CBE cannot benefit from this remedy, because all civil penalties will be paid to the U.S. Treasury. Pet. Br. 37-41. However, this is too narrow a characterization of the purpose and benefits of civil penalties. The purpose of such penalties is not to enrich the U.S. Treasury. A major purpose of penalties is to deter violations. *Tull v. U.S.*, 481 U.S. 412, 422-423 (1987). If citizens cannot seek civil penalties for past violations, the deterrent effect of citizen suits and penalties for violations of EPCRA in their communities will be eviscerated. As a result, citizens will be exposed to the risk of increased pollution.

The availability of civil penalties encourages citizens to bring citizen suits to remedy and deter violations. "Citizen

plaintiffs often initiate suit not to recover monetary awards for their own benefit, but rather to ensure that penalties are imposed so as to deter future violations." *Pan American Tanning Corp.*, 993 F.2d at 1021. Civil penalties also encourage defendants to reduce or eliminate their violations to limit or avoid their liability, which can be as high as \$25,000 per day. 42 U.S.C. § 11045(c).

In the present case, these incentives caused CBE to file its notice letter and suit, and caused the Steel Company to file, belatedly, its EPCRA reports. If citizens can not seek civil penalties for past violations, they will be unable to recover the costs of identifying violators. As a result, citizens' incentive to investigate violators and file citizen suits will be greatly reduced. In addition, if violators could avoid civil penalties by complying after they receive notice of a citizen suit, they would have a greatly reduced incentive to comply promptly and voluntarily with their reporting obligations. Instead, they would have an incentive to delay their compliance. In effect, violators could avoid penalties at will. Then, when the noticed violations had become moot, violators could resume their noncompliance until they received another notice letter. As a result, citizen suits would have no real deterrent effect.

In the 1990 amendments to the Clean Air Act, several Senators recognized that the inability to sue for past violations would have exactly this type of devastating impact on deterrence.¹⁸ The Senate considered the "Nickles-Heflin-Dole" amendment, No. 1456, which would have adopted *Gwaltney* and retained the existing language which authorized citizens to sue only those

¹⁸In the 10 years since *Gwaltney* was decided, Congress has enacted only one comprehensive reauthorization of the major federal environmental statutes. In the 1990 reauthorization of the Clean Air Act, Congress rejected the *Gwaltney* principle that citizens should only be able to sue for ongoing violations. EPCRA was enacted in 1986, prior to *Gwaltney*. As a result, the legislative history of that statute contains no discussion of Congress' approach to that issue. Congress had no reason to address the *Gwaltney* issue in the Pollution Prevention Act of 1990, since EPCRA's citizen suit provision differed from the CWA provision construed in *Gwaltney* and no court had decided at that time that EPCRA's language prohibited citizen suits for wholly past violations.

persons "alleged to be in violation" of the Act. 136 Cong. Rec. 6437, 6557, 6564 (1990), § 609(a). In the debates on this amendment, Senator Chafee, one of the floor managers for the Senate bill, described the effect of this amendment:

The second point is on the citizen suit, the citizen cannot collect for past damages. In other words, the citizen has to give notice, under the law--and we all agree with this--has to give notice to the polluter that he is giving suit and that gives the polluter 60 days to straighten out the situation. Under my colleague's [Sen. Nickles'] proposal he cannot go back and collect anything for past damage. He can only collect for future damage. I do not understand the rationale for that provision. What the polluter does, he says: "Oh, that is right. I will straighten it out." So he straightens it out. And since the citizen cannot collect for any past damages and the polluters stop, then there is no ground for a suit. He stops within the 60 days.

Then what happens? The polluter starts polluting again, let us say somebody upstream, upwind. Then again the citizen has to go through this rigamarole, 60 days' notice; within the 60 days give notice. And the polluter says: "Oh, dear, I am sorry." We go through this charade possibly for several times.

Id. at 5627. The Senate rejected this proposed amendment and its language does not appear in the final enactment. *Id.* at 6442.

Thus, Congress wanted penalties to deter violators. Here, penalties deter petitioner from violating EPCRA in the future. Petitioner is under a continuing obligation to file EPCRA reports on a regular basis. It will deter the company specifically from evading that obligation if it knows that such evasions will be penalized.

Moreover, penalties will serve the general public interest in deterring other companies generally from failing to file required reports under EPCRA. Since CBE has asserted "distinct and palpable" harm to itself, it may also "invoke the general public

interest in support of [its] claim." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The imposition of penalties will deter other companies in the Chicago area and elsewhere from violating their EPCRA obligations in the future. Those companies will have a greater incentive to file reports quickly under EPCRA, instead of waiting to file, if they know they can be sued for past violations even if they file their reports before being sued. *SPIRG v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1200-01 (D.N.J. 1985).¹⁹

The deterrent effect of civil penalties is not speculative and has long been recognized by Congress. In numerous environmental statutes, Congress has drawn a direct connection between deterrence and civil penalties. In 1990, Congress amended the citizen suit provision of the Clean Air Act to authorize citizens to seek civil penalties. The Senate report on that provision stated that "[t]he assessment of civil penalties for violations of the Act is necessary for deterrence, restitution and retribution." S. Rep. No. 228, 101st Cong., 1st Sess. 373 (1989). Similarly, "[t]he legislative history of the [Clean Water] Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Tull*, 481

¹⁹Recently, in *Bennett v. Spear*, 117 S. Ct. 1154 (1997), this Court found that the deterrent effect of civil penalties provided a sufficient prospect of remedial action to confer standing. The plaintiffs in that case challenged the adequacy of a biological opinion issued by the Fish and Wildlife Service (FWS) under the Endangered Species Act. Plaintiffs claimed that they were injured because restrictions on lake levels recommended in the FWS' opinion would cause federal agencies to reduce the amount of irrigation water available to them. This Court held that, although federal agencies were not bound to follow the opinion and reduce the water levels, they had a strong incentive to do so to avoid penalties for taking endangered species. According to the Court, the "powerful coercive effect" of the biological opinion on other federal agencies made it likely that plaintiffs' injury (i.e., the threatened water level restrictions) would be redressed if the biological opinion were set aside. 117 S. Ct. at 1165. Similarly, the civil penalties imposed on EPCRA violators have a "powerful coercive effect" in stimulating compliance with EPCRA.

U.S. at 422-423.²⁰

Congress has also viewed citizen suits which seek penalties as an important deterrent. During the 1985 debates on the CERCLA citizen suit provision, Senator Baucus stated that "citizen enforcement is currently operating as Congress intended: first, to provide a prod and second an alternative to government enforcement." 131 Cong. Rec. 24748 (1985). He also stated that "the scope and effectiveness of the publicity generated by recent citizen enforcement seems likely to act as a general deterrent." *Id.* at 24749. The Senate Report on the 1987 amendments to the Clean Water Act similarly stated that citizen suits "are a proven enforcement tool" that "have deterred violators and achieved significant compliance gains." S. Rep. No. 50, *supra*, p. 28. Congress has therefore decided that civil penalties are causally related to deterrence. With civil penalties in citizen suits, violators are more likely to comply with the law.

If this Court were to question or reject this finding by Congress on the effect of civil penalties and citizen enforcement, it would intrude on the separation of powers between the judicial and legislative branches. If this Court limited citizens' rights to seek civil penalties for past violations, it would be limiting the power of Congress to define, and protect against, certain kinds of injury. See Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 233 (1988). It is the "exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *TVA v. Hill*, 437 U.S. 153, 194 (1978). In addition, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Cort v. Ash*, 422 U.S. 66, 84 (1975)(quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433

²⁰Congress amended the Clean Water Act in 1987 to give EPA administrative penalty authority because "issuance of an administrative order, without penalties, has not proven powerful enough to motivate violators or deter other similar violators." S. Rep. No. 50, 99th Cong., 1st Sess. 29 (1985). Congress expected that "this tool can be a strong force for achievement of quick compliance." *Id.*

(1964)). The purpose of penalties—detering violators—would be seriously undermined if citizens could not sue for wholly past violations.

Furthermore, contrary to petitioner's argument (Pet. Br. 36), it is not true that the only form of redress for past violations is a payment of penalties to the U.S. Treasury. In assessing the issue of whether there is a sufficient prospect of remedial benefit to plaintiffs, the court should analyze the full range of remedial opportunities available through trial or settlement. This includes not only a judgment on the merits, but also a negotiated consent decree.

A consent decree may provide "broader relief than the court could have awarded after a trial." *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 525 (1986). The courts have held that, in settlements of citizen suits, the parties may agree in a consent decree to apply the money to environmental projects that address the harm caused by the violation.²¹ The district courts in several EPCRA citizen suits have approved consent decrees in which payments were made to such projects. For example, in *Atlantic States Legal Foundation v. Whiting Roll-Up Door Mfg. Corp.*, 38 BNA Env't Rep. Cases 1426, 1428 (W.D.N.Y. 1994), the court approved a consent decree which required the violator to purchase emergency response equipment for local agencies and to conduct a five-year pollution prevention/toxics use reduction program.

Congress has specifically endorsed the use of payments for environmental projects in the settlement of enforcement actions under federal environmental statutes. The Conference Report on the 1987 amendments to the Clean Water Act stated:

Settlements of this type preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection. * * * [T]he conferees encourage this procedure where appropriate.

²¹*PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 81 n.32 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991); *Sierra Club v. Electronic Controls Design*, 909 F.2d 1350, 1355-56 (9th Cir. 1990).

H. Rep. No. 1004, 99th Cong., 2d Sess. 139 (1986).

As petitioner admits (Pet. Br. 24), EPA has endorsed the use of "supplemental environmental projects (SEPs)" in settlement of EPCRA enforcement actions. In its SEP policy, EPA recognized the deterrent effect of these projects:

The Agency encourages the use of SEPs. While penalties play an important role in environmental protection by deterring violations and creating a level playing field, SEPs can play an additional role in securing significant environmental or public health protection and improvements.¹

¹ Depending on circumstances and cost, SEPs also may have a deterrent impact.

EPA, *Interim Revised Supplemental Environmental Projects Policy*, *supra*, p. 2. EPA has specifically approved of SEPs which prevent or reduce the generation of pollution and which restore and protect the environment. *Id.* at 6-7. EPA has also approved of SEPs which increase emergency planning and preparedness under EPCRA. *Id.* at 9-10. EPA itself has settled EPCRA cases in which millions of dollars are designated for SEPs rather than the U.S. Treasury. For example, in *U.S. v. Sherwin-Williams*, the consent decree provided that the company would pay \$4.7 million in penalties and as much as \$10 million on a cleanup program aimed at bringing its 123-acre Chicago facility into compliance with federal environmental statutes, including EPCRA. 27 BNA Env't Rep. (Current Developments) 2029 (Feb. 7, 1997); 62 Fed. Reg. 7473 (Feb. 19, 1997).

Petitioner will be deterred to the same extent regardless of whether it pays a certain amount to the U.S. Treasury or to an environmental project. In either instance, it has suffered the same financial disadvantage. In addition, environmental projects can directly benefit CBE's members by reducing the pollution in their community. When these projects are included in the redressability analysis, it is clear that CBE satisfies the redressability requirement

for Article III standing.

IV. PERMITTING CITIZEN SUITS FOR PAST VIOLATIONS WILL NOT HAVE THE ADVERSE EFFECTS ALLEGED BY PETITIONER AND ITS AMICI

Petitioner and its *amici* argue that permitting citizens to sue for past violations would have serious adverse effects, *i.e.*, burdening the federal courts with a flood of citizen suits, interfering with government enforcement activities, and raising serious constitutional issues under Article II. On the one hand, these arguments prove too much. All of them might support an argument that citizen plaintiffs should not be allowed to sue for penalties at all. However, Congress clearly rejected this argument by giving citizens the penalty remedy. On the other hand, these arguments prove too little. Not one of them supports petitioner's position that citizen suits for ongoing violations are authorized, but identical suits for past violations are not.

Petitioner claims that citizen suits for past EPCRA violations will burden the federal courts. Pet. Br. 13, 46. Petitioner speculates that, since some 870,000 facilities are subject to EPCRA, citizens will bring a "deluge" of citizen suits seeking huge penalties against these facilities based on past, stale violations which have already been corrected. *Id.* at 6-7, 47.

The short answer to this *in terrorem* argument is that citizens have little or no incentive to bring suit for these kinds of violations. The courts are unlikely to impose significant penalties in such suits, since they will look to the same statutory guidelines that EPA must apply in assessing administrative civil penalties. Section 325(b)(1)(C) provides that in determining those penalties, EPA "shall taken into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, * * * any prior history of such violations [and] the degree of culpability * * *." 42 U.S.C. § 11045(b)(1)(C). Furthermore, the district court can award reduced attorneys' fees or none at all if the citizen suit recovers only a nominal penalty. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992); *Earth Island Institute v. Southern California Edison*,

838 F. Supp. 458, 466 (S.D. Cal. 1993).

Petitioner further argues that permitting citizens to sue for wholly past violations would "impermissibly intrude upon EPA's enforcement discretion." Pet. Br. 39. However, the United States rejected this argument in its *amicus* brief in the Seventh Circuit, stating that citizen enforcement "is critical to filling the gap between the number of significant environmental violations and the federal and state enforcement resources available to address such violations" and that dismissal of this case would "place additional burdens on EPA's enforcement resources." *Brief of the United States as Amicus Curiae*, pp. 2-3 (Feb. 28, 1996). Similarly, as we have shown above, Congress has repeatedly endorsed the use of citizen suits as a supplement to federal enforcement. In short, petitioner's argument has already been rejected by both Congress and the Executive Branch.

Furthermore, the Executive Branch's constitutional directive to "take Care" that the laws are faithfully executed is a duty, not an exclusive license. Art. II, § 3. If companies are violating the law, there is no interference with Executive prerogatives if a court issues a decision to that effect. Such a decision vindicates the law, and enforces it in a constitutionally authorized way.

Finally, petitioner and several supporting *amici* suggest that the Seventh Circuit's interpretation of EPCRA raises other constitutional problems under Article II. Pet. Br. 39; *Brief of Amicus Curiae The Washington Legal Foundation* 24-28. They argue that allowing citizens to sue for wholly past violations violates the separation of powers doctrine and the Appointments Clause by granting to private citizens powers that are vested exclusively in the Executive Branch. *Id.*

However, two federal district courts have found no constitutional infirmity with EPCRA's citizen suit provision on these grounds. *Buffalo Envelope*, 823 F. Supp. at 1072-76; *Kurz-Hastings*, 813 F. Supp. at 1138. In addition, at least five district courts have rejected similar constitutional challenges to the CWA's citizen suit provision. *Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc.*, 735 F. Supp. 1404, 1419-20 (N.D. Ind. 1990); *NRDC v. Outboard Marine Corp.*, 692 F. Supp.

801, 815 (N.D. Ill. 1988); *Sierra Club v. Port Townsend Paper Corp.*, 28 BNA Env't Rep. Cases 1676, 1678 (W.D. Wash. 1988); *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 623-25 (D. Md. 1987); *SPIRG v. Monsanto Co.*, 600 F. Supp. 1474, 1478 (D.N.J. 1985). This Court has invalidated statutes on Article II grounds only when Congress failed to "give the Executive Branch sufficient control over [enforcement] to ensure that the President is able to perform his constitutionally assigned duties" (*Morrison v. Olson*, 487 U.S. 654, 696 (1988)), attempted to retain control or supervision over the enforcement of the rights it created (e.g., *INS v. Chadha*, 462 U.S. 919, 958 (1983)), or granted enforcement authority to persons not constitutionally authorized to exercise it (*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982)).

Citizen suits have none of these features. First, they do not deny or limit the Executive's power to enforce the law. On the contrary, that power is specifically preserved by the numerous government oversight mechanisms in the citizen suit provision—advance notification of citizen suits, preclusion of such suits by prior government enforcement action, and government intervention as of right. 42 U.S.C. § 11046.²² Second, private litigants are not controlled by Congress. Third, Congress has the power "to determine * * * who may enforce [statutory rights] and in what manner." *Davis v. Passman*, 442 U.S. at 241. Congress can therefore constitutionally create a cause of action for a private

²²In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1941), this Court upheld the constitutionality of a *qui tam* statute which provided citizens with far broader prosecutorial discretion than does EPCRA. The False Claims Act, as then in force, entitled the *qui tam* plaintiff to prosecute frauds committed against the federal government and retain one-half of the penalty collected. Act of March 2, 1863, 12 Stat. 696, 698, 31 U.S.C. § 231-234 (1940). That statute did not provide for any of the government oversight mechanisms in EPCRA. It therefore follows *a fortiori* that EPCRA, which grants much more extensive protection to Executive Branch enforcement interests than did this *qui tam* statute, is constitutional.

citizen to sue "on his own behalf" (42 U.S.C. § 11046(a)) to remedy and prevent nondisclosure of the use and release of toxic chemicals in his community. In seeking penalties for such nondisclosure, citizens are vindicating their own rights. Congress can grant this remedy as a means of deterring violators and encouraging pollution prevention. The selection of particular remedies, like civil penalties, to effectuate policy "is a matter within the legislature's range of choice." *Tigner v. Texas*, 310 U.S. 141, 148 (1940).

CONCLUSION

For these reasons, the Seventh Circuit's decision should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1996

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BRIEF OF AMICI CURIAE STATES OF NEW YORK,
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INDIANA, MASSACHUSETTS, MISSOURI, NEW
HAMPSHIRE, NORTH CAROLINA, OKLAHOMA,
VERMONT, VIRGINIA, WEST VIRGINIA AND THE
TERRITORY OF GUAM IN SUPPORT OF
RESPONDENT

INTEREST OF AMICI CURIAE

The States submit this brief pursuant to Rule 37 of the Rules of the Supreme Court in support of the respondent, Citizens For a Better Environment ("CBE"), and its efforts to enforce the Emergency Planning and Community Right-to-Know Act, ("EPCRA"), an environmental reporting statute intended to provide the public with information on the presence and release of hazardous substances in the community. The *amici curiae* States appear through their respective Attorneys General who are responsible for enforcement of certain reporting requirements under EPCRA. The *amici curiae* States urge affirmance of the decision of the court below.

This case involves the failure of the petitioner, The Steel Company, to file annual hazardous chemical inventory and toxic chemical release forms (hereinafter "chemical inventory and release forms") for eight years in repeated violation of EPCRA Sections 312 and 313, 42 U.S.C. §§ 11022 and 11023. These chemical inventory and release forms advise the community of the presence and release of hazardous substances and enable planning and preparation for emergencies.

The reporting requirements of EPCRA Sections 312 and 313 are designed to provide crucial information annually to State and local governments and the public on which they may rely in making decisions. States have a strong interest in assuring that timely information on the presence and release of hazardous substances is filed and available to communities, to emergency planners and responders, and to State and local environmental regulators. The States therefore have a strong interest in assuring strict compliance with the reporting requirements of Sections 312 and 313.

The States' interest would be adversely affected by a reversal of the decision of the court below because compliance incentives for facilities subject to EPCRA's reporting requirements would be eliminated. If facilities can "cure" violations by simply filing years late and thereby prevent penalties and injunctive relief from being imposed, facilities may not comply with the reporting requirements at all until enforcement is sought.

The outcome of this case will affect not only compliance, but also the States' ability to enforce EPCRA's requirements effectively. If citizens may not enforce EPCRA Section 313, 42 U.S.C. § 11023, once a facility belatedly files, enforcement efforts will be seriously compromised and the public health jeopardized because hazardous chemical releases will not be disclosed. Moreover, given the structure of EPCRA which requires the States to utilize the citizen suit provision, Section 326(a)(2), 42 U.S.C. § 11046(a)(2), when seeking to enforce Section 313 violations, this Court's construction of the citizen suit provision will dictate the extent to which State regulatory agencies and Attorneys General throughout the United States may enforce chemical release reporting violations under Section 313. Thus, States have a significant interest in the determination reached here.

Citizen enforcement efforts are a necessary and welcome complement to the enforcement efforts of federal, State and local regulatory agencies whose resources are limited. Tens of thousands of facilities are subject to EPCRA's reach and detection and prosecution of all violators by the Environmental Protection Agency ("EPA") is virtually impossible. Citizen enforcement is a necessary component of the regulatory scheme. States have an interest in maximizing EPCRA compliance and in attaining its goals through citizen enforcement efforts. The

determination of the court below, which implicitly addressed the foregoing State interests, should be affirmed.

SUMMARY OF THE ARGUMENT

1. The express language of EPCRA Section 326(a)(1) authorizes a civil action by "any person" for a facility's failure to comply with the procedural and substantive requirements of EPCRA's reporting provisions. Section 326(a)(1) expressly provides that suit may be commenced for a facility's "failure to . . . complete and submit" chemical inventory and release forms as required "under" Sections 312 and 313. 42 U.S.C. § 11046(a)(1)(A)(iii) and (iv). These forms are statutorily required to be filed every year by March 1 and July 1, respectively. 42 U.S.C. § 11022(a)(2) and 42 U.S.C. § 11023(a). The failure to file the forms by the deadlines noted in Sections 312 and 313 constitutes violations subject to a citizen suit. A citizen suit may be maintained for injunctive relief, penalties and attorneys' fees against a facility failing to strictly comply with Sections 312 and 313. Section 326(c) gives the district court jurisdiction to award such relief in a citizen suit.

2. EPCRA's citizen suit provision is entirely different than the citizen suit provision in the Clean Water Act ("CWA"), 33 U.S.C. § 1365. The primary differences are found in EPCRA's statutory purpose of protecting communities in which facilities are located, in the defined reporting deadlines, and in the language of the citizen suit provision which is not cast in the present tense, unlike the CWA's citizen suit provision. The court below thoroughly analyzed these differences and properly concluded that a citizen suit could be maintained for wholly past violations.

3. The legislative history of EPCRA reflects the Congressional intent to promote strict compliance with EPCRA's annual filing deadlines and with its other substantive requirements. Congress found unacceptable the risks to communities from chemical exposure and emergencies, and intended to prevent such risks through enforcement of strict compliance with EPCRA.

4. EPA, the federal agency responsible for administering EPCRA, does not consider late filing to constitute "current compliance" or to cure violations. EPA interprets Section 313 to require *timely* annual filing of required reports and treats a facility's "failure to report at all" in the same fashion as a facility's "failure to timely report." EPA considers both to be violations of EPCRA punishable by civil penalties and injunctive relief. EPA's interpretation is consistent with the protective goals of the statute and is entitled to great weight and deference.

5. State and citizen enforcement efforts would be seriously undermined if suit cannot be maintained against a facility that continually fails to comply with EPCRA's reporting requirements. There are strong public policy reasons for providing citizens with the ability to seek redress. The imposition of prospective injunctive relief and penalties compels compliance not only by the violating facility but by other facilities subject to EPCRA's requirements. Absent a legal consequence imposed as a result of non-compliance, facilities subject to EPCRA's requirements will have no incentive to comply. Citizen suits supplement and complement State and federal enforcement efforts. Citizen enforcement is critical to EPCRA's purpose, which is the protection of public health. Congress intended to give enforcement authority to a wide-ranging class of plaintiffs, including citizens, in order to assure the comprehensive

protection of communities in which hazardous chemicals are present and released.

6. CBE's complaint presents a "case or controversy" and CBE has standing to maintain a civil action for The Steel Company's failure to file annual chemical inventory and release forms by the dates set forth in EPCRA Sections 312 and 313. In the context of a motion to dismiss, the allegations in CBE's complaint are deemed true. These allegations sufficiently set forth a basis for standing. CBE's complaint alleges that both CBE and its members have been placed at risk and harmed by The Steel Company's failure to report. Specifically, the complaint alleges that CBE uses EPCRA data reported by facilities in its programmatic activities and (1) reports to its members and the public about the storage and release of toxic chemicals to the environment; (2) advocates changes in environmental laws; and (3) seeks reduction of toxic chemicals and effective enforcement of environmental laws. CBE members have been exposed to releases of hydrochloric acid (also known as hydrogen chloride) and other hazardous chemicals, and were entitled to know of the releases and to make decisions and choices with respect to their exposure. CBE members reside in a community in which the emergency planners and responders lacked adequate information to protect the community and the public health in the event of an emergency. CBE has drained its resources by investigating, researching and otherwise pursuing The Steel Company's chemical inventory and release information that should have been readily available. CBE has a risk of future injury because The Steel Company's past violations indicate a likelihood of future violations. CBE injury will be redressed by the relief requested in the complaint. Future violations will be deterred and CBE's resources will not be expended in pursuing

information that is required as a matter of law to be filed under EPCRA.

ARGUMENT

POINT I

CBE'S CITIZEN SUIT IS EXPRESSLY AUTHORIZED BY EPCRA SECTION 326(a)

A. Express Language of Section 326(a)

CBE's citizen suit against The Steel Company is expressly authorized by EPCRA Section 326(a) for the company's failure to file chemical inventory and release forms for eight years. Under Sections 312 and 313, chemical inventory and release forms must be filed by specific deadlines every year. 42 U.S.C. §§ 11022(a) and 11023(a) and (g). The failure to meet these deadlines constitutes a violation which, under the express statutory language of Section 326(a), may be subject to a citizen suit. 42 U.S.C. § 11046(a). Section 326(a) authorizes a citizen suit against a facility "for failure to . . . complete and submit" hazardous chemical inventory forms by March 1 every year, and "for failure to . . . complete and submit" toxic chemical release forms by July 1 every year.

More specifically, "any person" may commence a civil action against a facility for failure, *inter alia*, to complete and submit to the State Emergency Response Commission ("SERC"), the Local Emergency Planning Committee ("LEPC") and the local fire department:

1. hazardous chemical inventory forms identifying the nature, quantity and location of chemicals at the

facility on or before March 1, 1988 and annually thereafter, as required under Section 312(a) and (d), 42 U.S.C. § 11022(a) and (d); and

2. toxic chemical release forms for each chemical manufactured, processed or otherwise used at and released from the facility in amounts exceeding threshold quantities on or before July 1, 1988 and annually thereafter, as required under Section 313(a), 42 U.S.C. § 11023(a).

See, 42 U.S.C. § 11046(a)(1).¹

Prior to commencing a citizen suit, 60 days' notice of the violation must be given to the EPA, the State and the violating facility. Section 326(d), 42 U.S.C. § 11046(d). A citizen suit may not be commenced if EPA is "diligently pursuing" an administrative order or civil action to enforce the requirements of EPCRA or to impose civil penalties. 42 U.S.C. § 11046(e).

State or local governments are authorized to commence a civil action against a facility for the failure to submit, among other things, Section 312 hazardous chemical inventory forms to the State, the SERC, the LEPC, or local fire department. See, 42 U.S.C. § 11046(a)(2)(A)(iv). A State or local government need

¹ Citizens are also authorized to sue a facility for failing to provide follow-up emergency notification of a release of an extremely hazardous substance "as soon as practicable" after the release, as required by Section 304(c), 42 U.S.C. § 11004(c), and for failure to submit material safety data sheets for each hazardous chemical at the facility as required by Section 311(a), 42 U.S.C. § 11021(a). Citizens may also sue EPA, a State, or a SERC for failing to make reporting information available to the public or to respond to a request by the public for detailed Section 312 chemical inventory information. See, 42 U.S.C. § 11046(a)(1)(B), (C) and (D).

not give 60 days' notice to the violating facility under this provision. If a facility fails to submit a Section 313 toxic chemical release form, however, as The Steel Company failed to do here, State and local enforcement authorities must sue as "persons," utilizing the citizen suit provision of Section 326(a)(1), 42 U.S.C. § 11046(a)(1), and are subject to the 60-day notice requirement.²

Under the express terms of Section 326(c), the district court has jurisdiction in any civil action brought under Section 326(a) to grant the following relief:

1. Enforce the requirements of EPCRA; and
2. Impose a civil penalty for violation(s) of the requirement(s); and
3. Award costs, including attorneys fees and expert witness fees, to the prevailing party.

See, 42 U.S.C. § 11046(c) and (f). This is the full range of relief to which a "person," including a citizen, a State or local government, a SERC or an LEPC, is entitled in a suit brought under Section 326(a), 42 U.S.C. § 11046(c) and (f). Clearly, this is the relief to which CBE is entitled here.

The court below exhaustively analyzed the differences between the language of EPCRA's citizen suit provision and the language of the Clean Water Act's ("CWA's") citizen suit provision as construed by this Court in *Gwaltney of Smithfield*,

² "Person" is defined in EPCRA to include State and local governments. See, 42 U.S.C. § 11049(7).

Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). This Court in *Gwaltney* held that a citizen suit must allege that a facility is "in violation," meaning that it is in continuous or intermittent violation of a permit and is discharging contaminants unlawfully. *Gwaltney*, 484 U.S. at 57. This Court viewed the pervasive use of the present tense in the CWA to mean that Congress intended a citizen suit to be authorized only for "continuous or intermittent" violations. 484 U.S. at 59. Unlike the CWA, however, EPCRA's citizen suit provision is not cast in the present tense and its language authorizes a citizen suit for past violation.

Section 326(a) authorizes an action for a facility's "failure to . . . complete and submit" chemical inventory and release forms required "under" Sections 312 and 313. Compliance with Sections 312 and 313 requires not only that specific substantive information³ be submitted to State and local emergency responders and be made available to the public, [see, 42 U.S.C. §§ 11022(a)(2); 11022(e); 11023(a); 11023(h)], but that the information be submitted *by a specific date each year*. *Citizens For a Better Environment v. The Steel Company*, 90 F.3d 1237, 1243 (7th Cir. 1996), *cert. granted*, 117 S.Ct. 1079 (1997) ("[t]hese [filing deadlines] are not guidelines or suggestions; they are essential elements of the provisions citizens have authority to enforce").

The most natural reading of the phrase "failure to . . . complete and submit [chemical inventory and release forms] . . .

³ The substantive requirements of Sections 312 and 313 provide that annual chemical inventory and release forms include, among other things, the nature, quantity and location of hazardous chemicals at the facility, and an assessment of the amount of releases of such substances to the environment. 42 U.S.C. §§ 11022(d) and 11023(g).

under" Sections 312 and 313, is that a citizen plaintiff may sue for a facility's past violations despite attempts to "correct" violations by late filing. This reading makes sense because once the annual deadlines have been missed, adverse impacts have occurred which cannot be corrected. The court below properly concluded that Section 326(a) authorizes a citizen suit for a facility's failure to file by the date noted in the statute and that late filing is insufficient to constitute compliance. 90 F.3d at 1243.⁴

The Steel Company has consistently asserted that once it belatedly filed eight years of reports, it was "in compliance" and no citizen suit could be maintained for past violations, referring to this Court's holding in *Gwaltney*, 484 U.S. at 59. This proposition was rejected by the court below, 90 F.3d at 1244, and should be rejected here. Prompt receipt of the information every year by SERCs, LEPCs, and local fire departments, and its availability to the public, is crucial to achieving EPCRA's purposes of emergency planning and community right-to-know.⁵

⁴ The court below also referred to the use of the past tense in the venue provision of Section 326(b)(1), 42 U.S.C. § 11046(b)(1), which provides for a citizen suit to be commenced in the district "in which the alleged violation occurred." 90 F.3d at 1244. This provision is cast in the past tense and is consistent with the reading of Section 326(a) that would authorize suits for past violations.

⁵ The complaint alleges that in failing to file chemical inventory and release forms, The Steel Company failed to disclose to State and local emergency planners and responders and to the public the presence and release of hydrochloric acid (JA 5-6), an "extremely hazardous substance" that poses a significant health risk from exposure. This information was crucial to CBE's members in reaching decisions regarding where they chose to live and work in order to avoid exposure to an established health risk. This information was also crucial to CBE in its associational role of educating the public about chemicals in the community, developing plans for emergency preparedness, and attempting to reduce toxic chemicals where its members live, work and visit (JA 5).

Congress would not have included the specific annual deadlines of March 1 in Section 312(a) and July 1 in Section 313(a) if that filing requirement could be ignored. The Steel Company was not "in compliance" when it belatedly filed eight years of reports.

As this Court has repeatedly stated, "the starting point for interpreting a statute is the language of the statute itself." *Gwaltney*, 484 U.S. at 56; *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Absent a clearly expressed legislative intention to the contrary, the words of the statute are conclusive. *Hallstrom*, 493 U.S. at 28; *GTE*, 447 U.S. at 108. The Court need not proceed beyond the express language of Sections 326, 312 and 313 to conclude that a citizen suit is authorized for repeated past violations.

B. EPCRA's Legislative History

Although EPCRA's language is unambiguous and the Court need not go beyond the words of the statute, its legislative history further supports this reading of Section 326(a), 42 U.S.C. § 11046(a). EPCRA's purpose as a "community right-to-know" statute was stated by one of its principal architects to be as follows:

First, Congress recognizes a compelling need for more information about the Nation's exposure to toxic chemicals. Until now, the success of regulatory programs . . . has been impossible to measure because no broad-based national information has been compiled to indicate increases or decreases in the amounts of toxic pollutants entering our environment. The reporting requirements and the [Section 313] toxic chemical release forms in particular, are intended to provide this national

information. As a result, the reporting provisions in this legislation should be construed expansively to require the collection of the most information. . . .

A second major principle of this program is to make information regarding toxic chemical exposure available to the public, particularly to the local communities most affected. For too long, the public has been left in the dark about its exposure to toxic chemicals. Information that has been available under existing environmental statutes, . . . has been difficult to aggregate and interpret, which has made it difficult, if not impossible, for the public to gain an overall understanding of their toxic chemical exposure. Consequently, the reporting requirements should be construed to allow the public the broadest possible access to toxic chemical information in formats that are straightforward and easy to understand.

See, 132 Cong. Rec. H9593-94 (daily ed. October 8, 1986) (Statement of Rep. Edgar), reprinted in Senate Committee on Environment and Public Works, *A Legislative History of the Superfund Amendments and Reauthorization Act of 1986*, Vol. 6, pp. 5313-14 (Comm. Print 1990).

The legislative history also indicates a Congressional intent to enforce strictly the deadlines delineated in the statute. Reporting must be "swift and complete" and the requirements of the statute "must be strictly and strenuously enforced." *See, supra*, 132 Cong. Rec. at H9593 (Statement of Rep. Sikorski).

C. EPA'S Interpretation of EPCRA

EPA is the federal agency responsible for administering EPCRA along with SERCs, LEPCs and local fire departments.

Like the court below, EPA views late filing of Section 313 chemical release forms as a violation of EPCRA subject to enforcement and the imposition of civil penalties. See, EPA, Office of Compliance Monitoring, *Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 and Section 6607 of the Pollution Prevention Act of 1990* (1992).

EPA's policy does not allow a facility to "correct" its violations through late filing. EPA views late filing as non-compliance subject to enforcement. Enforcement by a citizen suit under Section 326(a) for Section 313 reporting violations is implicit in EPA's policy. This is precisely the enforcement CBE seeks here. As the federal agency responsible for administering EPCRA, EPA's interpretation of what constitutes non-compliance for purposes of enforcement is entitled to great weight and deference. See, *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). The reading of Section 313 by the court below and its conclusion that citizens may sue for past violations is fully consistent with EPA's policy, unlike the Sixth Circuit's decision in *Atlantic States Legal Foundation v. United Musical Instruments USA, Inc.*, 61 F.3d 473, 475-77 (6th Cir. 1995) (late submission of Section 313 chemical release forms constitutes compliance and is not equivalent to a complete failure to submit such forms).

POINT II

STATE AND CITIZEN ENFORCEMENT OF EPCRA WOULD BE UNDERMINED IF AN ACTION MAY NOT BE MAINTAINED FOR REPORTING VIOLATIONS

State and citizen enforcement of EPCRA would be seriously undermined if suit may not be maintained against a facility that continually fails to comply with annual reporting requirements. There are strong public policy reasons that favor both a citizen's and a State's right to seek an injunction and penalties even when a facility files late in an attempt to remedy its past wrongs. Compliance with EPCRA is assured only if violations are penalized. Penalties are a powerful deterrent to non-compliance. Cf., *National Independent Coal Operators Assoc. v. Kleppe*, 423 U.S. 388, 408 (1976) (penalty provision of Coal Mine Health and Safety Act is essential to achieving Congress' intent to deter and prevent mining accidents and if operator faces no monetary penalty for violations, "he has little incentive to eliminate danger"); *Abercrombie v. Clarke*, 920 F.2d 1351, 1358-59 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991) (termination of bank's violation of Comptroller of Currency's cease and desist order did not eliminate need for assessment of penalties because penalties for past violations deter future violations).

As this Court has noted in the context of mootness:

Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. . . . A controversy may remain to be settled in such circumstances . . . , *e.g.*, a dispute over the legality of the

challenged practice *The defendant is free to return to his old ways.* This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts have rightfully refused to grant defendants such a powerful weapon against public law enforcement.

United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (emphasis added; citations omitted). If a citizen under EPCRA is prohibited from seeking to redress past harms, a violator "is free to return to his old ways." This reading of EPCRA provides too powerful a weapon to the violator against enforcement. Moreover, citizen enforcement virtually would be eliminated because once the right to redress is gone, citizens will lack the incentive to notify and prosecute violators.

The Steel Company asserts that CBE currently suffers no present harm once the company filed its reports, albeit eight years late. That is simply not the case (*See, infra*, Point III (A), pp. 21-22). The implication of this assertion, however, is that a State would be unable to seek relief under Section 326(a) for reporting violations once a facility belatedly files. A State bringing a Section 313 enforcement action could be subject to a claim of mootness, for example, if a facility can eliminate the harm by filing past due reports once notice is received or suit is commenced.⁶ Under The Steel Company's analysis, State

⁶ As previously noted, States must sue as "persons" under Section 326(a) for violations of Section 313 and provide 60 days notice but may sue immediately for violations of Sections 311 and 312. Either way, suit would be barred under The Steel Company's analysis because once past due reports

(continued...)

Attorneys General would lack the ability to seek any punitive relief for Section 313 reporting violations once a facility quickly acts to file past due reports. This is simply not what Congress intended.

Rather, in passing Section 326, Congress sought to grant enforcement authority to a wide-ranging class of plaintiffs and thereby assure strict compliance with the statute. This class of plaintiffs includes EPA, State and local governments, SERCs, LEPCs and citizens. Each is entitled to seek penalties, injunctive relief and attorneys' fees for violations. 42 U.S.C. §§ 11045 and 11046(c). This type of broad-reaching enforcement is a necessary component of EPCRA's regulatory scheme, particularly because of the large number of facilities subject to its provisions.⁷ EPA and the States simply lack adequate resources to investigate and prosecute all violations. This comprehensive enforcement scheme, which includes citizens, operates to protect the public from toxic chemical exposure and accidents precisely as Congress envisioned. *See*, 42 U.S.C. § 11046(a).

The Steel Company also asserts that the 60-day notice provision is primarily intended to give facilities the ability to come into compliance without facing a penalty. (*See*, petitioner *Steel Company* brief at p. 15.) To the contrary, when Section 326(d) and Section 326(e) are read together it is clear that the

⁶(...continued)

are filed, enforcement cannot be sought because there is no "continuing violation" and the case is moot.

⁷ The number of facilities nationwide that are subject to EPCRA is estimated to be close to 180,000. *See EPA Request for Public Comment on Small Business Administration Petition to Review Reporting Thresholds Under Community Right-to-Know Law*, 57 Fed. Reg. 48706, 48708 (Oct. 27, 1992).

primary purpose of the 60-day notice provision is to give EPA the opportunity to "diligently pursue" violations. See, Section 326(d) and (e), 42 U.S.C. § 11046(d) and (e). The 60-day notice requirement simply is not intended to provide an escape hatch for violators to attempt to "cure" past wrongs that continue to have an impact. A facility may of course use the 60-day notice period to file past due reports, but under EPCRA, past due filing does not operate to bring a facility into compliance since the risk of injury to the community is far-reaching. When facilities fail to report, thousands of people living in a community are placed at risk from unknown chemical exposure and from emergencies for which State and local responders are unprepared. Late filing simply does not eliminate this risk nor achieve EPCRA'S objectives of emergency preparedness and community right-to-know.

POINT III

CBE HAS STANDING TO SEEK REDRESS OF THE STEEL COMPANY'S EPCRA VIOLATIONS

CBE has standing to seek redress of The Steel Company's eight years of reporting violations. CBE has suffered a concrete injury caused by the company's non-compliance. CBE and its members have been deprived of crucial information which has affected their ability to assess the risk of exposure, to prepare for emergencies, and to participate in environmental regulatory decision-making in an effort to reduce chemicals in the community (JA 4-5). CBE's resources also have been adversely affected by having to research and investigate the absence of The Steel Company's reporting information. These resources otherwise could have been expended on activities such as citizen participation and education (JA 4-5). This injury is concrete and particularized, not conjectural or hypothetical. *Whitmore v.*

Arkansas, 495 U.S. 149, 155 (1990); *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

CBE's injury is sufficiently set forth in its complaint and will be redressed by the injunctive and penalty relief and award of litigation costs authorized by Section 326(c), 42 U.S.C. § 11046(c). CBE's injury is related to a legally protected interest under EPCRA, that is, the right-to-know on an ongoing basis about the nature and quantity of chemicals present and released in the community. CBE therefore has presented a "case or controversy" and has proven its standing by alleging in the complaint an injury that (1) is fairly traceable to The Steel Company's unlawful conduct; and (2) is likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

This case comes to the Court in the "pleadings stage," in the context of a motion to dismiss. At this stage, general factual allegations of injury in CBE's complaint suffice to confer standing because the pleaded facts necessary to support an EPCRA claim are presumed to be true. See, *Bennett v. Spear*, ___ U.S. ___, 117 S.Ct. 1154, 1164; 137 L.Ed.2d 281, 299 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. at 561; *Gwaltney*, 484 U.S. at 65; *Warth v. Seldin*, 442 U.S. at 501; F.R.C.P. 12(b) and (c); 5A *Wright & Miller Federal Practice and Procedure* § 1368 (2d ed. 1990). Although the burden is on CBE to establish standing, *Lujan*, 504 U.S. at 561, that burden is a modest one at the pleadings stage. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994). The beginning point for the Court's analysis is CBE's complaint.

A. CBE's Complaint Sufficiently Sets Forth That It Has Suffered Injury-in-Fact Traceable to The Steel Company's EPCRA Violation

CBE's complaint asserts that both it and its members have suffered injury-in-fact as a result of The Steel Company's failure to submit chemical inventory and release forms by the specific dates set forth in Sections 312(a) and 313(a), 42 U.S.C. § 11022(a) and § 11023(a):

CBE seeks, acquires, and uses data reported by facilities under EPCRA in its programmatic activities. Based on this data, CBE reports to its members and the public about storage and releases of toxic chemicals into the environment, advocates changes in environmental regulations and statutes, prepares reports for its members and the public, seeks the reduction of toxic chemicals and further seeks to promote the effective enforcement of environmental laws.

(JA 4-5). The complaint states that CBE's organizational purpose as a citizen's group is to "prevent environmental health threats through research, advocacy, public education and citizen involvement" (JA 4). Without The Steel Company's chemical inventory and release forms, CBE has been prejudiced in achieving its organizational goals of prevention, research, advocacy, public education and citizen involvement. Moreover, CBE's resources have been devoted to obtaining the chemical inventory and release information to which it is undisputedly entitled under EPCRA.

CBE's complaint also states that its members "reside, own property, engage in recreational activities, breathe the air, and/or

use areas" in the community in which The Steel Company's facility is located, and:

CBE's members seek, acquire and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit. The safety, health, recreational, economic, aesthetic and environmental interest of CBE's members and their right to know about such releases have been, are being, and will be adversely affected by defendant's actions in failing to file timely and required reports under EPCRA.

(JA 5). Thus, CBE's complaint establishes injury of a legally protected interest by showing that the group and its members use in their activities the chemical inventory and release data reported under EPCRA (JA 4-5). Because The Steel Company has failed to file this data, CBE and its members cannot "plan emergency preparedness," or "attempt to reduce toxic chemicals in areas in which they live, work and visit" (JA 5).

CBE asserts that its members' interests "have been, are being, and will be adversely affected" by The Steel Company's failure to file chemical inventory and release forms (JA 5). The Steel Company's violations are "continuing," and have a "present adverse effect," *Lujan*, 504 U.S. at 564, in the sense that there have been eight years of unknown chemical releases and exposure and a lack of preparedness that continues to the present. The community has lacked the power of choice in avoiding chemical exposure from these releases, and even now is not likely to be prepared for emergencies that may occur at The Steel Company's facility. CBE is entitled to present evidence to the

district court that the Chicago LEPC emergency response plan prepared pursuant to Section 303, 42 U.S.C. § 11003, does not include The Steel Company's facility.⁸ Emergency response plans contain detailed procedures for public notification, evacuation of affected areas, and necessary cleanup actions. A plan amendment to include an entire facility and all of its emergency contingencies can be tedious and expensive for an LEPC to undertake since it often lacks the resources to accomplish the task efficiently. This, too, constitutes a continuing harm from The Steel Company's eight years of violations that CBE is entitled to prove.

Continuing injury to CBE is also found in the absence of any Steel Company data in EPA's "Toxics Release Inventory National Report" which identifies chemical releases nationwide. EPA's report is widely relied upon by State and local environmental regulators in permitting and other decision-making, and by citizens in making choices regarding where they live and work. CBE's members continue to live with the State and local environmental decisions that have been made for eight years

⁸ LEPCs were required to prepare emergency response plans encompassing all facilities within a community by October 1988. Section 303(a), 42 U.S.C. § 11003(a). Facilities were required to provide the LEPC with all information necessary, or requested, to develop the emergency plan. These plans must include at a minimum (1) identification of all the facilities within the community subject to EPCRA; (2) methods and procedures for facilities, emergency responders, and medical personnel to follow in the event of an emergency; (3) designation of emergency coordinators for the community and an emergency coordinator for the facility; (4) procedures for timely notification that a release has occurred to persons in the plan and to the public; (5) methods for determining when a release has occurred and the area or population likely to be affected; (6) descriptions of emergency equipment and emergency facilities available in the community; (7) evacuation plans and traffic routes; (8) training programs for local emergency response and medical personnel; and (9) methods and schedules for effectuating the emergency plan.

without the benefit of The Steel Company's Section 313 chemical release data.⁹

The Steel Company's eight years of unreported releases present a strong indication that future non-compliance will occur if the company is not penalized now for its prior violations. Without a clear incentive for The Steel Company to comply in the future, the company is likely to ignore EPCRA's reporting requirements again. CBE therefore has a "reasonable expectation that the wrong will be repeated" and is entitled to prove its allegation of future injury. *Gwaltney*, 484 U.S. at 66-67; *United States v. W.T. Grant*, 345 U.S. at 633.

B. CBE's Injury Will Be Redressed By the Relief Requested in the Complaint

CBE's injury will be redressed by the penalty and injunctive relief and costs requested in the complaint. CBE's complaint requests a prospective order (1) requiring The Steel Company to provide CBE with all reports for one year; and (2) authorizing CBE to inspect The Steel Company's facility and records to monitor compliance (JA 11). If this relief is granted, not only will compliance be assured but CBE will not be forced to expend its resources again to enforce compliance.

⁹ For eight years, federal, State and local regulatory decision-making has not taken into account The Steel Company's releases. This kind of information is critical to environmental regulatory decision-making and to "the development of appropriate regulations, guidelines and standards." 42 U.S.C. § 11023(h). For example, the limitations and requirements set forth by environmental regulators in permits may take into account a company's total amount of releases annually. Additionally, environmental regulators and the facility itself have been deprived of the information necessary to determine whether the company should alter its operation or implement pollution prevention and best management practices in an effort to stem releases.

CBE also prays for an order requiring the payment of civil penalties. Penalties, if assessed, will punish for past non-compliance and will deter future non-compliance (JA 11).¹⁰

Finally, CBE requests an assessment of statutorily authorized litigation costs in connection with prosecuting the action (JA 11). An award of litigation costs will satisfy the significant resources CBE has been forced to expend in investigating, researching, and otherwise uncovering The Steel Company's violations. These costs will also redress the legal resources CBE has been forced to expend in its effort to enforce EPCRA compliance.

CBE has therefore satisfied the criteria for standing and the allegations in its complaint present a "case or controversy." U.S. Const., Art. III, § 2.

¹⁰ Civil penalties assessed under Section 326(a), 42 U.S.C. § 11046(a), are payable to the United States Treasury.

CONCLUSION

For the foregoing reasons, the determination of the court below should be affirmed.

Dated: June 23, 1997

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